2012

CUMULATIVE SUPPLEMENT

TO

MISSISSIPPI CODE

1972 ANNOTATED

Issued September, 2012

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
ENACTED THROUGH THE 2012 REGULAR SESSION
OF THE LEGISLATURE

PUBLISHED BY AUTHORITY OF
THE LEGISLATURE

SUPPLEMENTING

Volume 1

(As Revised 2005)

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By the Editorial Staff of the Publisher

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5460123

ISBN 978-0-327-09628-3 (Code set)
ISBN 978-0-820-56731-0 (Volume 1)

Matthew Bender & Company, Inc.

701 E.Water St., Charlottesville, VA 22902-5389

www.lexisnexis.com

(Pub.44510)

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of your Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

— Advance Code Service
— Advance Sheets
— Amendment Notes
— Analyses
— Attorney General Opinions
— Code Status
— Comparable Legislation from other States
— Court Rules
— Cross References
— Editor's Notes
— Effective Dates
— Federal Aspects
— Index
— Joint Legislative Committee Notes
— Judicial Decisions
— Organization and Numbering System
— Placement of Notes
— Replacement Volumes
— Research and Practice References
— Source Notes
— Statute Headings
— Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, as well as a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest.

Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects.*

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully-annotated softcover volume, which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and are edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, which may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States* and *Federal Aspects.*

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates.*

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting practices and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the

Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, Ameri-

can Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the Code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

PUBLISHER'S FOREWORD

Statutes

The 2012 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2012 Regular Session.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2012 Regular Session.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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September 2012 LexisNexis

SCHEDULE OF NEW SECTIONS

Added in this Supplement

TITLE 1. LAWS AND STATUTES

CHAPTER 3. Construction of Statutes

MISSISSIPPI CODE 1972

ANNOTATED

VOLUME ONE

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I

THE CONGRESS

§ 8. Powers of Congress.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

Recent Decision: Constitutional Law--The Dormant Commerce Clause and the Twenty-First Amendment--Reconciling the Two Constitutional Provisions to Allow The Direct Shipment of Wine, 75 Miss. L.J. 619, Winter, 2006.

Constitutional Limits on State Taxation of a Nonresident Trustee: Gavin Misinterprets and Misapplies Both Quill and McCulloch, 76 Miss. L.J. 1, Fall, 2006.

§ 9. Powers Prohibited to United States

JUDICIAL DECISIONS

2. Ex post facto law.

The amendment to Miss. Code Ann. § 47-5-138.1 was not an ex post facto law; even though the amended statute held that an offender was not eligible for trusty status if the offender was convicted of trafficking in controlled substances, defendant continued to receive the 10 days for 30 days time benefit under the prior statute. Ross v. Epps, 922 So. 2d 847 (Miss. Ct. App. 2006).

§ 10. Powers Prohibited to States

JUDICIAL DECISIONS

3. Ex post facto laws — In general.
4. — Crimes and offenses, ex post facto laws.
5. — Sentences and punishment, ex post facto laws.

6. Impairment of contract obligations — In general.

3. Ex post facto laws — In general.

4. — Crimes and offenses, ex post facto laws.

Trial court erred in summarily dismissing a prisoner's motion for post-conviction relief; an evidentiary hearing was necessary to decide whether application of the amended version of Miss. Code Ann. § 47-5-138.1 to the prisoner, who had pleaded guilty to the crime of sale and transfer of cocaine, constituted an ex post facto violation. Gray v. State, 13 So. 3d 283 (Miss. Ct. App. 2008), writ of certiorari denied by 2009 Miss. LEXIS 344 (Miss. July 23, 2009).

5. — Sentences and punishment, ex post facto laws.

After the supreme court remanded defendant's matter for resentencing and the circuit court resentenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. Foster v. State, 961 So. 2d 670 (Miss. 2007).

6. Impairment of contract obligations — In general.

Miss. Const. Art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1 were violated when a decision was retroactively applied to releases executed in a personal injury case; the law in effect at the time the releases were executed stated that the release of an agent had no effect on a principal's vicarious liability. The validity and obligation of a contract could not have been impaired by a court decision altering the construction of the law. Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009).

Article III

The Judiciary

§ 2. Jurisdiction of Courts; Supreme Court, Original and Appellate Jurisdiction; Criminal Trial by Jury

JUDICIAL DECISIONS

1. In general.

Requirements of U.S. Const. Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights; plaintiff political party's attempts to demonstrate actual or threatened injury by (a) declaring its intention, were the statute not in place, to hold closed primaries, (b) asserting a threat of prosecution against it for violating state election law, and (c) protesting its inability to modify party rules without legislative sanction, failed to satisfy its burden to show a case or controversy. Although the party contended its executive committee's decision to authorize a suit was sufficient to give it standing to challenge the statute, without concrete plans or any objective evidence to demonstrate a "serious interest" in a closed primary, the party suffered no threat of imminent injury. Miss. State Democratic Party v. Barbour, 529 F.3d 538 (5th Cir. 2008).

Although plaintiff political party unquestionably pleaded a constitutional injury by alleging that Mississippi's semi-closed primary statute required it to associate with members of the other party during its candidate-selection process, it took no internal steps to limit participation in its primaries to party members and thus could not claim that Miss. Code Ann. § 23-15-575 actually had an unconstitutional effect; this lack of "actual controversy" made the case too remote and abstract an inquiry for the proper exercise of the judicial function under U.S. Const.

Art. III. Miss. State Democratic Party v. Barbour, 529 F.3d 538 (5th Cir. 2008).

Article IV

States; Reciprocal relationship between states and with United States

§ 1. Full faith and credit

JUDICIAL DECISIONS

2. Jurisdiction of court.

Doctor enrolled the New Mexico judgment on March 3, 1999, and the clerk mailed notice of the enrollment on that date, and the attorney then had 20 days to contest the enrollment of the judgment; where the attorney's response was filed on April 28, 1999, outside the 20-day limit, the attorney's defenses to the enrollment which alleged false representations by the doctor were not properly before the trial court. Schwartz v. Hynum, 933 So. 2d 1039 (Miss. Ct. App. 2006).

AMENDMENTS

Amendment I

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

JUDICIAL DECISIONS

4.5. Freedom of speech violation not shown.

Judge's statements were not protected by the First Amendment as the judge's comment concerning African-Americans in Hinds County was not a matter of legitimate public concern; the conference where the judge made her remarks was not a forum for expressing personal concerns about the alleged lack of educational background or demeanor of fellow judges or the alleged lack of intelligence of supervisors, nor was it the proper place for an alleged personal attack on a team participant, or an alleged attack on residents of Hinds County. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

5. Flag display and salute.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

9. Freedom of religion—In general.

First Amendment forbids civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice; however, subject matter jurisdiction existed over former parishioners' claim that

the church breached a fiduciary duty by improperly diverting funds designated for reconstruction of a church after Hurricane Katrina. Schmidt v. Catholic Diocese, 18 So. 3d 814 (Miss. 2009).

11. Freedom of speech and press—In general.

15. — Professional regulation, freedom of speech and press.

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

23. Elections and politics.

Order that the judge be suspended from office for a period of one year was appropriate because his commentary on Caucasian official and their African-American appointees in his jurisdiction was not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity. The comments were not made within the content, form, or context of a matter of legitimate public concern. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

RESEARCH REFERENCES

ALR. Landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs. 10 A.L.R.6th 513.

Law Reviews. Note: The Conundrum of Applying an "Incoherent" First Amendment Jurisprudence: Glassroth v. Moore, 24 Miss. C. L. Rev. 115, Fall, 2004.

Free Speech and the End of Dress Codes and Mandatory Uniforms in Mississippi Public Schools, 24 Miss. C. L. Rev. 27, Fall, 2004.

Note: Should Shielding Children from Internet Pornography and Protecting Free Speech be Mutually Exclusive? Ashcroft v. American Civil Liberties Union, 25 Miss. C. L. Rev. 117, Fall, 2005.

Symposium on Religion, Religious Pluralism, and the Rule of Law: Introduction, 27 Miss. C. L. Rev. 1, 2007/2008.

Symposium on Religion, Religious Pluralism, and the Rule of Law: The Underlying Causes of Divergent First Amendment Interpretations, 27 Miss. C. L. Rev. 67, 2007/2008.

AMENDMENT III

SOLDIERS DENIED QUARTER IN HOMES

RESEARCH REFERENCES

Law Reviews. Recent Decision: Constitutional Law--Taxpayer Standing to Challenge Executive Spending--Discretionary Spending versus Spending Pursuant to Congressional Authority, 77 Miss. L.J. 695, Winter, 2007.

Amendment IV

Search and seizure

JUDICIAL DECISIONS

1. In general.

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results; the warrant authorizing the blood alcohol test was valid and thus, defendant's constitutional rights were not violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

2. Criminal proceedings.

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper where his Fourth Amendment argument was procedurally barred because a guilty plea waived the right to raise Fourth Amendment challenges on appeal. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

2.5. Standing to challenge search.

Defendant failed to establish that he had a reasonable expectation of privacy in a motel room where money from a bank robbery was found as the room was registered in the name of a third party; as defendant did not produce evidence that he had a reasonable expectation of privacy in the motel room, he lacked standing to contest the search and the admission of the evidence obtained as a result of the search. Lyons v. State, 942 So. 2d 247 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

4. Use of force.

In a 42 U.S.C.S. § 1983 suit, an arrestee adequately pled claims for excessive use of force against a police officer because he had a clearly established Fourth Amendment right not to be bodily removed from his car after being stopped for careless driving and thrown to the ground; the officer's actions were not shielded by the doctrine of qualified immunity or governmental immunity arising under Miss. Code Ann. § 11-46-9(1). Stepney v. City of Columbia, — F. Supp.

2d —, 2009 U.S. Dist. LEXIS 16376 (S.D. Miss. Feb. 18, 2009).

12. Roadblocks.

Checkpoint was set up in daylight, on a straight thoroughfare, and there was a definitive plan established by the officers for checking vehicles; appellant's stop was conducted in a safe and reasonable manner. Thus, any minor deviation from the departmental policy was reasonable under the circumstances and did not violate appellant's constitutional rights. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

15. Blood, bodily fluids, etc.

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Although defendant claimed that taking his blood sample constituted an unlawful search and seizure in violation of his Fourth Amendment rights because the officer had no probable cause to take his blood, the court found that drawing blood evidence from a defendant at the hospital without a warrant following an accident was not a violation of the defendant's Fourth Amendment rights because the law enforcement officer had probable cause given that the facts surrounding the accident evinced reasonable suspicion that evidence material to the criminal investigation, an illegal blood alcohol level, would be found. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

19. Search warrant — In general.

20. —Affidavit, search warrant.

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit court had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in rela-

tion to defendant in such sexually explicit terms that veracity could easily be inferred. Foley v. State, 914 So. 2d 677 (Miss. 2005).

21. — Probable cause, search warrant.

After an appellate court reversed defendant's drug possession conviction by finding that the trial court should have granted defendant's suppression motion because the magistrate who issued the search warrant lacked a substantial basis for concluding that probable cause existed and because the probable cause determination was based upon false and/or omitted information, the state supreme court held that there there was no showing that the investigator intentionally misrepresented facts or made them in reckless disregard for the truth; the investigator described the confidential informant (CI) who provided information about defendant's activities as reliable in the past because he knew him to be a reliable CI used by the police department on occasion, and he was able to independently corroborate the CI's reliability when a controlled buy resulted in defendant selling cocaine to the CI. The investigator's omission of the fact that there was a controlled buy the day before did not constitute a reckless disregard for the truth, and the omission was adequately explained by the investigator, who testified that he was protecting the identity of the CI; as such, the warrant was supported by adequate probable cause. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (U.S. 2009).

Search warrant was supported by probable cause because an officer personally observed a drug transaction and subsequently took a statement that the buyer regularly purchased cocaine from the pool hall; that information supported the prior anonymous statements that defendant kept and sold cocaine at the pool hall. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Search warrant affidavit was detailed, the confidential informant was an eyewitness to illegal acts and had a reliable track record, and the magistrate proceeded on more than mere suspicion in issuing the warrant; there was no merit to defendant's argument that under the given facts the warrant was fatally defective because of inadequate probable cause, and the trial court did not err in admitting the evidence obtained from the search of defendant's residence. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

22. —Totality of circumstances, search warrant.

Court rejected defendant's claim that he was subjected to an illegal search and seizure, and that the confidential informant was not sufficiently reliable to establish probable cause for a search warrant as required under the Fourth Amendment, because the test for probable cause in Mississippi is the totality of the circumstances and defendant admitted to the undercover officer that he had drug paraphernalia in his home, which was sufficient to give the officer probable cause to believe that defendant had and was committing a crime and to place him under arrest. Also, the informant's reliability was confirmed by a recording of the informant's telephone conversations with defendant. Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

24. — Sufficiency of search warrant.

Defendant's convictions for capital murder during the commission of a robbery were proper because the search warrant for the farm was based on probable cause, was sufficiently particular regarding the place to be searched, and was properly executed. At trial, through use of testimony and exhibits, the farm was described as a cluster of buildings, situated fairly close together, consisting of a metal shed, a wooden shed, an abandoned farmhouse, and an outhouse (or old chicken house); a search of any or all of these buildings was within the scope of the warrant, which authorized search of "a farm house" and "any out buildings normally associated with this residence." Gillett v. State, 56 So. 3d 469 (Miss. 2010),

writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

27. Search without warrant — In general.

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove, when an informant told officers the subject of outstanding arrest warrants would be driving a similar vehicle, because the good-faith exception to the exclusionary rule did not apply as (1) an officer said the officer did not know the identity of the subject of the arrest warrants, so the officer could not reasonably execute the warrants without verifying the suspect's identity, and (2) the officer's misinterpretation of constitutional mandates, contradictions between the officer's arrest report and testimony, and the officer's failure to resolve the suspect's identity made the exception inapplicable. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Court properly denied a motion to suppress where an officer testified that the bulge in defendant's shorts was unusually large and given his erratic behavior, defensive posturing, and possession of a pocket knife, the officer believed that the bulge could be a weapon; therefore, at the time the officer proceeded to pat the bulge, the officer had not extended the search of defendant beyond what was necessary to determine whether he was armed and dangerous. In addition, the officer stated that when he touched the bulge, he could feel stems and seeds through the fabric of defendant's shorts that he thought was marijuana, and it was immediately apparent to the officer that the bulge was marijuana. Tate v. State, 946 So. 2d 376 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 66 (Miss. 2007).

28. — Consent, search without warrant.

Trial court did not commit reversible error in admitting beer cans found in defendant's car into evidence because even though the beer cans were found in the course of a warrantless search of the car, there was no Fourth Amendment violation, as the car was parked on defendant's brother's premises and defendant's brother, as the renter of the premises, had sufficient authority to consent to a search of the premises; because defendant's brother did consent to a search of his premises, the evidence collected pursuant to that consent was constitutionally acquired. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not err in denying defendant's motion to exclude evidence taken from a car that he was driving; because defendant's wife was the titled owner of the automobile, the police were reasonable in their belief that she possessed common authority, joint control, and mutual use over the car so as to give her the authority to consent to a search. Peters v. State, 920 So. 2d 1050 (Miss. Ct. App. 2006).

29. — Plain view, search without warrant.

Search was lawful under the plain view exception to the warrant requirement because the officer had the legal authority to stop defendant for running a stop sign and to approach the vehicle. In addition, the incriminating character of the black duffel bag and other items was readily apparent, as the officer was aware that those types of items were used in the recent restaurant armed robbery, and they were in plain view. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

33. —Motor vehicles, search without warrant.

Defendant's convictions for possession of cocaine with the intent to distribute and possession of cocaine were appropriate because, notwithstanding that defendant consented to the search of his vehicle, the use of narcotics-detection dogs during a stop based on probable cause was not in violation of the Fourth Amendment. Jaramillo v. State, 950 So. 2d 1104 (Miss. Ct. App. 2007).

Search of a vehicle was a valid inventory search where defendant was legally arrested, there was no one available to remove defendant's vehicle from the roadside, and under such circumstances, the standard procedure was to call a wrecker to impound the vehicle and conduct an

inventory search. Garrison v. State, 918 So. 2d 846 (Miss. Ct. App. 2005).

During a traffic stop, defendant was arrested for driving without a license, no taillights, and possession of beer by a minor; his car was searched by police. The circuit court correctly admitted evidence of marijuana found in the vehicle, because the search fit squarely into the automobile exception. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

36. —Observation by police officer, search without warrant.

Court correctly concluded that defendant's detention was legal and did not exceed what was necessary where an officer testified that although he initially stopped defendant for speeding, his observance of defendant led him to suspect that defendant had been driving under the influence of a drug. Prior to the pat down search, the officer had not completed his activities incident to the traffic stop nor allayed his reasonable suspicion that defendant had been driving under the influence of a drug. Tate v. State, 946 So. 2d 376 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 66 (Miss. 2007).

36.5. — "Reasonable suspicion" under "Terry" rule.

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as the officers' observations and the informant's information gave the officers no reasonable suspicion since the officers acted, without independent investigation, on the caller's vague description of the car. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as (1) the subject of the warrants was not present, and (2) nothing showed the officers knew the description of the arrest warrants' subject's car, so, absent further independent investigation, the officers could only stop defendant to clarify defendant's identity, but the stop exceeded this permissible scope. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Motion to suppress evidence was properly denied in a drug case because a Terry stop did not violate U.S. Const. Amend. IV or Miss. Const. Art. III, § 23, where an officer had a reasonable suspicion that a vehicle had no tag in violation of Miss. Code Ann. § 27-19-323 and Miss. Code Ann. § 27-19-40, since the officer could not see a "special in-transit tag" on a tinted window. Gonzales v. State, 963 So. 2d 1138 (Miss. 2007).

Officers had reasonable suspicion to stop defendant's vehicle because they received information from an informant that she had been purchasing marijuana from an individual she knew as "Trouble," further investigation revealed that "Trouble" was defendant, the officers asked the informant to arrange to buy marijuana from defendant, and as defendant's vehicle, which matched exactly the description of "Trouble's" car given by the informant, approached the abandoned bridge, it was stopped by an officer who recognized defendant and knew that he was on probation for a prior conviction. Carlisle v. State, 936 So. 2d 415 (Miss. Ct. App. 2006).

37. — Probable cause, search without warrant.

Search of defendant's automobile was not illegal as the car was lawfully stopped for speeding and once he smelled marijuana, the trooper had probable cause to search the vehicle; the trooper's legal search of the vehicle yielded the money and the Carpet Fresh spray can. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759 (Miss. Ct. App. 2009).

Officer had probable cause to initiate a traffic stop of defendant's vehicle because defendant was stopped after law enforcement officials received credible information that he had purchased some precursor chemicals to manufacture a controlled substance, methamphetamine, at two dif-

ferent stores within a short span of time. Watts v. State, 936 So. 2d 377 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 452 (Miss. 2006).

39. — Admissibility of evidence, search without warrant.

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evidence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the purpose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309 (Miss. Ct. App. 2009), affirmed by 50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Police officer lawfully and properly stopped a vehicle with an expired tag; when defendant, the driver, consented to a search of his vehicle and where the police officer and defendant talked while waiting for another officer to appear so that the search could be conducted by two officers as required by state law, where defendant indicated that he had recently "lost" his girlfriend and his demeanor changed significantly, where the officer contacted dispatch to inquire whether the girlfriend had been injured and if authorities in southern Mississippi were searching for defendant, and where the officer learned that defendant was a person of interest in the girlfriend's murder and placed defendant under arrest, the trial court did not err in denying defendant's motion to suppress evidence obtained as a result of the stop because the stop was proper, the length of the detention was reasonable, and the consent to search was valid. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

40. Search incident to arrest.

Defendant's convictions for capital murder during the commission of a robbery were proper because the denial of his motion to suppress his warrantless arrest and the seizures incident thereto was not clearly erroneous nor contrary to the substantial evidence before it. The trial judge was not required to make on-the-record findings of historical fact before ruling on a motion to suppress evidence; the Federal Rules of Criminal Procedure were not applicable in the case; and Kan. Stat. Ann. § 22-2401 specifically allowed for arrests based on probable cause. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

Search incident to arrest exception to the warrant requirement applied because the officers testified to seeing the black duffel bag and money from a robbery at the traffic stop in plain view in the vehicle. The officers recovered money and receipts from defendant, and when the officer arrived, he saw that defendant was wearing a tan shirt and white tennis shoes; the store's employees had described the armed robber as wearing a tan shirt and white shoes. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

Search and seizure of defendant's truck and the cocaine contained therein were proper as incident to a lawful custodial arrest because defendant was lawfully arrested based on probable cause and the cocaine found inside his vehicle was clearly within the permissible scope of the search, i.e. a container located in the passenger compartment of the vehicle. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR. Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment — Drugs other than marijuana and cocaine and unidentified drugs. 12 A.L.R.6th 553.

Construction and application of rule permitting knock and talk visits under Fourth Amendment and state constitutions. 15 A.L.R.6th 515.

When Does Use of Taser Constitute Violation of Constitutional Rights. 45 A.L.R.6th 1.

Law Reviews. Note: Weighing Society's Need for Effective Law Enforcement Against an Individual's Right to Liberty: Swinney v. State and the Forty-Eight Hour Rule, 24 Miss. C. L. Rev. 73, Fall, 2004.

Note: Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-and-Announce Rule After Hudson v. Michigan, 27 Miss. C. L. Rev. 435, 2007/2008.

Symposium article: Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis, 74 Miss. L.J. 553, 2004.

Symposium article: Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants, 74 Miss. L.J. 501, 2004.

Symposium; The Tools to Interpret the Fourth Amendment: Foreword, 74 Miss. L.J. 273, 2004.

Symposium article: Making the Right Gamble: The Odds on Probable Cause, 74 Miss. L.J. 279, 2004.

Symposium article: The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules, 74 Miss. L.J. 341, 2004.

Symposium article: Terry v. Ohio at Thirty-Five: A Revisionist View, 74 Miss. L.J. 423, 2004.

Symposium article: "A Flame of Fire": The Fourth Amendment in Perilous Times, 74 Miss. L.J. 631, 2004.

Symposium: The Search and Seizure of Computers and Electronic Evidence: The Fourth Amendment in an Era of Ubiquitous Technology, 75 Miss. L.J. 1, Fall, 2005.

Symposium: The Search and Seizure of Computers and Electronic Evidence: Search Warrants in an Era of Digital Evidence, 75 Miss. L.J. 85, Fall, 2005.

Symposium: The Search and Seizure of Computers and Electronic Evidence: Transaction Surveillance by the Government, 75 Miss. L.J. 139, Fall, 2005.

Symposium: The Search and Seizure of Computers and Electronic Evidence: The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer, 75 Miss. L.J. 193, Fall, 2005.

Symposium: The Search and Seizure of Computers and Electronic Evidence: Computer Searches of Probationers -- Diminished Privacies, "Special Needs" & "'Whilst' Quiet Pedophiles" -- Plugging the Fourth Amendment into the "Virtual Home Visit", 75 Miss. L.J. 273, Fall, 2005.

Reflections on Standing: Challenges to Searches and Seizures in a High Technology World, 75 Miss. L.J. 1099, Spring, 2006.

Symposium: Programmatic Purpose, Subjective Intent, and Objective Intent: What Is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?: The Reasonable Policeman: Police Intent in Criminal Procedure, 76 Miss. L.J. 339, 2006.

Symposium: Programmatic Purpose, Subjective Intent, and Objective Intent: What Is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?: Subjective "Intent" as a Component of Fourth Amendment Reasonableness, 76 Miss. L.J. 373, 2006.

Symposium: Programmatic Purpose, Subjective Intent, and Objective Intent: What Is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?: Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Excsionary Rule, 76 Miss. L.J. 483, 2006.

The Detention of Material Witnesses and the Fourth Amendment, 76 Miss. L.J. 585, 2006.

Symposium: Independent State Ground: Should State Courts Depart from the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court's Result?; Foreword, 77 Miss. L.J. i, Fall, 2007.

Symposium article: State Constitutional Methodology in Search and Seizure Cases, 77 Miss. L.J. 225, Fall, 2007.

Symposium article: Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Standards and the Original Understanding of "Due Process of Law", 77 Miss. L.J. 1, Fall, 2007.

Symposium article: Reactive and Incompletely Theorized State Constitutional Decision-Making, 77 Miss. L.J. 265, Fall, 2007.

Symposium article: Fourth Amendment and Independent State Grounds, 77 Miss. L.J. 401, Fall, 2007.

Rights Without Remedies: The Court that Cried "Wolf", 77 Miss. L.J. 401, Fall, 2007.

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

JUDICIAL DECISIONS

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3. Indictment—In general.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because an indictment was sufficient without listing aggravating circumstances; any time an individual was charged with murder, he was put on notice that the death penalty might result.

Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

4. —Waiver, indictment.

Defendant's guilty plea to armed robbery as charged in a criminal information rather than an indictment was proper under U.S. Const. Amend. V and Miss. Const. Art. 3, § 27, because defendant waived the indictment requirement. The trial court was not required under Miss. Unif. Cir. & Cty. R. 8.04 to discuss with defendant whether he was entitled to early release. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

5. Double jeopardy — In general.

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. Pendleton Grain Growers v. Pedro, 271 Or. 24, 530 P.2d 85 (1975).

7. —Civil and criminal proceedings, double jeopardy.

Jeopardy had not attached when the municipal court dismissed defendant's driving under the influence (DUI) charge in the municipal court, where the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Moreover, the judge's comments on the order relative to the DUI charge did not contain any findings of the court, but rather, the court merely recorded the reasons that the prosecutor gave for not proceeding to trial on the DUI charge; such notations in the order did not constitute either an acquittal or an adjudication, such that the subsequent indictment or trial of defendant would be barred by the Double Jeopardy Clause, U.S. Const. amend. V, Miss. Const. art. 3, § 22. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

During defendant's trial for second-offense DUI, the trial court did not commit reversible error by allowing the State to reopen its case-in-chief to offer proof of the first DUI conviction where it appeared that the omission of the essential element was due to the trial judge's misunderstanding of the law; defendant was not "twice placed in jeopardy" when the trial court granted the brief recess. Lyle v. State, 987 So. 2d 948 (Miss. 2008).

Defendant's convictions for murder and for shooting into an occupied dwelling did not violate the double jeopardy clause of the Fifth Amendment. In order to convict defendant for shooting into an occupied dwelling, the State was required to prove that defendant shot into a dwelling house, but no such showing was required to convict defendant under the felony-murder statute. Boyd v. State, 977 So. 2d 329 (Miss. 2008).

Dismissal of the inmate's motion for post-conviction relief was proper in part because the inmate had pled guilty to manslaughter and was never prosecuted for murder; thus, he was not twice put in jeopardy of life or limb in violation of the Fifth Amendment. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

8. —Juveniles, double jeopardy.

Defendant's claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements

of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. Graves v. State, 969 So. 2d 845 (Miss. 2007).

9. —Same elements, double jeopardy.

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust, and there was no double jeopardy. Branch v. State, 998 So. 2d 411 (Miss. 2008).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. Peacock v. State, 970 So. 2d 197 (Miss. Ct. App. 2007).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

10.5. — Same episode, no double jeopardy.

Defendant's double jeopardy rights were not violated by her convictions for three counts of driving under the influence and negligently causing death because the State was not required to specifically list the substance or substances that defendant allegedly was driving under the influence of at the time of the accident. Defendant was only convicted of one count of driving under the influence of hydrocodone and negligently causing the death or injury of another for each death or injury so caused. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's motion for post-conviction relief was properly denied where defendant's convictions for conspiracy to commit capital murder, accessory before the fact of grand larceny, and accessory before the fact of burglary of a dwelling with intent to commit assault did not subject defendant to double jeopardy; defendant's crimes were completely different and required proving different sets of elements. Byrom v. State, 978 So. 2d 689 (Miss. Ct. App. 2008).

Trial court properly dismissed defendant's motion for post-conviction relief where he was not subjected to double jeopardy by being convicted of three criminal offenses arising out of a single incident; a criminal defendant could be convicted of more than one offense that arose out of a single event where each offense required proof of a different element. Ward v. State, 944 So. 2d 908 (Miss. Ct. App. 2006).

Protection guaranteed by the Double Jeopardy Clauses of the Fifth Amendment

and Miss. Const. Art. 3, § 22, and the doctrine of collateral estoppel, did not preclude the State from charging defendant with a cocaine offense that was the basis for an unsuccessful petition to revoke his probation, because there were different issues and burdens of proof involved in a revocation hearing and a trial on the indictment. A revocation hearing is conducted to enforce the court's order imposing conditions on a defendant under a suspended sentence, and the issue to be determined at trial on the indictment is whether the State has proven beyond a reasonable doubt the elements of the charge; therefore, collateral estoppel does not apply. Oliver v. State, 922 So. 2d 36 (Miss. Ct. App. 2006).

Inmate's convictions for aggravated assault and aggravated robbery did not violate his Fifth Amendment right to be free from double jeopardy because even though the charges arose from the same set of facts, the two charges had different elements that the State needed to prove and one was not a lesser-included offense of the other. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

12. — Conspiracy, double jeopardy.

Appellate court affirmed the denial of the inmate's motion for postconviction relief because the inmate was not subjected to double jeopardy for the separate convictions of conspiracy to commit capital murder and attempted capital murder as they are two separate crimes. Lee v. State, 918 So. 2d 87 (Miss. Ct. App. 2006).

12.5. —Nolle prosequi, double jeopardy.

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. Ewing v. State, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Defendant's voluntary refusal to testify against his co-defendant constituted a material breach of his plea bargain agreement with the State, and, as a result of his breach, the parties were returned to the status quo ante; thus, defendant had no double jeopardy defense available concerning re-indictment and conviction on the charges. Also, the transcript of defendant's guilty plea hearing clearly showed that he was aware that the State would seek to invalidate his plea and reinstate the charges if he failed to testify truthfully against his co-defendant; additionally, as to the reinstatement of a kidnapping charge, it was fully within the State's authority to re-indict defendant for the same offense after an order of nolle prosequi had been entered. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

13. —Mistrial, double jeopardy.

Trial court did not err in failing to dismiss an indictment on the basis of double jeopardy because the prosecution had not deliberately provoked a mistrial by failing to disclose to defendant prior to trial that an officer would testify that defendant had surrendered defendant's driver's license prior to running from officers. Daniels v. State, 9 So. 3d 1194 (Miss. Ct. App. 2009).

13.5 — Multiple punishments, double jeopardy.

Trial court sentenced defendant to criminal contempt for refusal to testify in co-defendant's trial; because his failure to testify constituted a material breach of the plea agreement, the State reinstated the kidnapping charge, for which defendant was subsequently convicted and sentenced to 25 years' imprisonment. Defendant contended that the kidnapping conviction and sentence constituted a second punishment for his refusal to testify, thus subjecting him to double jeopardy; however, defendant was punished once for his refusal to testify against his co-defendant and once for the separate and dis-

tinct crime of kidnapping the victims, and, thus, his right double jeopardy rights were not violated as he was not punished multiple times for the same crime. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

14. —Capital sentencing, double jeopardy.

Harsher sentence imposed on defendant was proper where, in his second sentencing hearing, the judge heard new evidence concerning the events of the crimes and that evidence led him to believe that the crime was more heinous than the judge originally believed. There was no indication of vindictiveness and neither the double jeopardy provision nor the Equal Protection Clause imposed an absolute bar to the more severe sentence upon reconviction. Fowler v. State, 919 So. 2d 1129 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 56 (Miss. 2006).

16.5. — Resentencing, double jeopardy.

Reinstatement of defendant's suspended sentence did not constitute double jeopardy because the trial court did not attempt to impose a greater sentence than that already levied on defendant. Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Federal district court correctly denied state death row inmate's habeas corpus petition; the venue chosen for petitioner's resentencing hearing was proper, even though it was in the county in which the crimes occurred, and even though the trial venue had been changed to a different county due to excessive pretrial publicity, because years had passed since petitioner had been found guilty, and although two selected resentencing jurors had some knowledge of the case, petitioner failed to prove that the resentencing jury was tainted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

17. Self-incrimination — In general.

In the absence of the sort of affirmative assurances embodied in the Miranda warnings, it does not violate due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand; a State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony. Hurt v. State, 34 So. 3d 1191 (Miss. Ct. App. 2009).

21. —Witnesses, self-incrimination.

Regardless of the availability of defendant's sister as a witness, where if called she would invoke her Fifth Amendment privilege in that she was also charged with capital murder along with defendant, it was improper to exclude testimony of her father as inadmissible hearsay under Miss. R. Evid. 804 because the statements were admissible as statements against interest in that they were sufficiently against the sister's penal interest by indicating her intention to murder her husband, they were sufficiently trustworthy, and they were corroborated by other evidence. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

23. —Privilege, self-incrimination.

Where defendant confessed to participating in the wife's plan to murder her husband, the victim's wife invoked the Fifth Amendment and therefore was an unavailable witness at trial; it was error for the circuit court to accept her blanket invocation of her privilege against self-incrimination without making a searching inquiry into what her testimony might be. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

24. —Request for counsel, self-incrimination.

In a case in which defendant argued that the trial court should have suppressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a

finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custodial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

27. —Comment by counsel on failure to testify, self-incrimination.

Defendant's capital murder conviction was appropriate because the trial court did not err in not declaring a mistrial after a witness's comment regarding defendant's exercise of his right to remain silent. The trial court's instruction, to which the defense did not object, cured the error of the testimony of the investigator; therefore, the investigator's comment on defendant's exercise of his right to remain silent did not constitute abuse of discretion by the trial court, nor reversible error. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Prosecutor's statement "she can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe" was not a comment on defendant's failure to testify. The prosecutor simply responded to the comments that defense counsel made during closing argument. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Prosecutor's statement was a permissible comment on the absence of evidence to support defendant's defense as the prosecutor's statement neither referred to defendant's failure to testify, nor by masked implication suggested defendant's silence was evidence of guilt; therefore, the circuit court did not abuse its discretion in overruling defendant's motion for a mistrial. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Where the prosecutor in no way, either directly or inferentially, put a negative spin on the fact that the defendant exercised his constitutional right not to testify, but merely addressed defendant's failure to present any case at all, the prosecutor did not violate Miss. Const. Art. 3, § 26 and the Fifth Amendment in her closing arguments, and no error was committed by the trial court in denying defendant's motion for a mistrial. Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari

dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 et seq., was appropriate in part because his Fifth Amendment right against self-incrimination was not violated since the prosecutor's comment was a fair response to the defense's claim that the state failed to call some witnesses who could have been helpful to the jury; the argument at issue did not specifically mention the inmate or refer to his failure to testify. Turner v. State, 953 So. 2d 1063 (Miss. 2007).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. Foley v. State, 914 So. 2d 677 (Miss. 2005).

29. —Accomplices and codefendants, self-incrimination.

While codefendants' Fifth Amendment rights would not have been violated by having handwriting exemplars examined by an expert to authenticate a statement allegedly written by the codefendant because the evidence would not have been used as testimonial evidence at trial, there was not a substantial need for expert assistance shown in that nothing in the record indicated that defendant ever attempted to have these statements authenticated by locating someone familiar with the handwriting of the codefendants under Miss. R. Evid. 901(b)(2). Therefore, the trial court did not err in denying defendant's motion to compel handwriting exemplars. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

30.5. —Statements regarding post-arrest silence, self-incrimination.

During defendant's trial for sexual battery of a child, the State did not impermissibly comment on his initial post-Miranda refusal to speak with investigators prior to his later statement about fondling the victim because the prosecutor's statement and an officer's testimony about his prior refusal to speak were simply a recitation of the facts concerning a preceding interview. Beasley v. State, 74 So. 3d 357 (Miss. Ct. App. 2010).

Complained of comments and testimony, even if improper, could not be said to amount to plain error in light of the significant circuit split as to whether the use of a defendant's post-arrest, pre-Miranda silence as substantive evidence of the defendant's guilt offended the Fifth Amendment; the references to appellant's post-arrest, pre-Miranda silence did not meet all the elements of the plain-error test in that those references could not be said to be plain, clear, or obvious under the law in Mississippi. Hurt v. State, 34 So. 3d 1191 (Miss. Ct. App. 2009).

In an aggravated assault case, defendants' rights to remain silent under U.S. Const. Amend. V were not violated as the deputy's statement regarding defendants' post arrest silence was harmless error in that their silence was not being used against them, and only one reference was made to their intentions to remain silent. Byrd v. State, 977 So. 2d 405 (Miss. Ct. App. 2008).

31. — Noncustodial interrogation, self-incrimination.

Defendant's convictions for felonious child abuse were appropriate because her statements to a family protection specialist were admissible since defendant was not subjected to custodial interrogation. Defendant was questioned by the specialist, and not the law enforcement officers who accompanied her; during the questioning, defendant was not under arrest, she was in her own home and free to terminate the interview; and nothing in the testimony of defendant or the specialist indicated that defendant believed that she was going to jail rather than temporarily being detained. Clark v. State, 40 So. 3d 531 (Miss. 2010).

31.5. — Custodial interrogation, self-incrimination.

Defendant was subjected to a custodial interrogation and, therefore, Miranda was required because (1) defendant was hand-

cuffed and questioned under his carport soon after law enforcement officers had executed a search warrant; (2) while various law enforcement officers were going in and out of the house, at least four officers were in the vicinity where defendant was being questioned; and (3) an officer placed a copy of the search warrant in a chair next to defendant so that he could read it and be aware of the situation. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

32. —Confessions generally, self-incrimination.

Trial court did not err in not suppressing defendant's statement to the police that defendant shot a victim in self defense because although defendant's initial denial of shooting the victim, followed by defendant's recantation of the denial in the face of a witness's accusation, which the jury subsequently saw and heard the witness testify to, was prejudicial, defendant would have been convicted beyond a reasonable doubt even without the tainted statement. Walton v. State, 998 So. 2d 1011 (Miss. Ct. App. 2007), affirmed by 998 So. 2d 971, 2008 Miss. LEXIS 572 (Miss. 2008).

Defendant's convictions for murder, sexual battery, and first degree arson were appropriate because, although the circuit court erred when it admitted his confession into evidence in violation of his Fifth Amendment right because defendant had already requested counsel, the admission was actually harmless in light of the other evidence connecting defendant to the crime, which included his DNA and finger prints that were found at the crime scene. Haynes v. State, 934 So. 2d 983 (Miss. 2006), writ of certiorari denied by 549 U.S. 1306, 127 S. Ct. 1874, 167 L. Ed. 2d 365, 2007 U.S. LEXIS 3602, 75 U.S.L.W. 3511 (2007).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

In a murder and aggravated assault case, incriminating statements made to police as defendant was being led to a patrol car were not suppressed because they were not the product of an interrogation; defendant made the statements as police were trying to read him his rights, and he was not questioned until after these warnings were given. Wilson v. State, 936 So. 2d 357 (Miss. 2006).

Defendant's right against self-incrimination was not violated where the trial court admitted his confession to armed robbery into evidence because four full days had elapsed between the time that defendant took crack cocaine and Lorcet and the time that he confessed; his confession could not be said to be the result of intoxication. Thomas v. State, 936 So. 2d 964 (Miss. Ct. App. 2006).

33. —Age of confessor, self-incrimination.

Statement of a thirteen-year-old defendant was properly admitted at his murder trial where he and his mother both signed a Miranda statement, there was no requirement that his mother be present during questioning, and the court was bound to apply the same standards for the voluntariness of defendant's confession as it would for any other confession. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

35. — Intoxication, self-incrimination.

During defendant's trial for felony DUI, third offense, the admittance of defendant's refusal to submit to a breath test was not a violation of his right against self-incrimination under either Miss. Const. Art. 3, § 26 or U.S. Const. Amend. 5; thus, defendant's challenge to the constitutionality of Miss. Code Ann. § 63-11-41 failed. Starkey v. State, 941 So. 2d 899 (Miss. Ct. App. 2006).

Defendant's self-incrimination rights were not violated because all law enforcement personnel who testified stated that

defendant did not appear to have been under the influence of drugs and there was no corroboration to defendant's assertions to the contrary; additionally, defendant's actions on the day of the murders indicated a mind capable of perceiving the world around him and taking control of his own actions. Scott v. State, 947 So. 2d 341 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 262 (Miss. 2007).

37. — Miranda warnings prior to confession, self-incrimination.

Court properly denied a motion to suppress under the Fifth Amendment because defendant was adequately advised of his Miranda rights; an officer read defendant his Miranda rights prior to the first interrogation, defendant signed a Miranda form, and the second interrogation commenced just eight minutes after the first interrogation ended. Additionally, the waiver was voluntary; defendant had no difficulty reading the rights, he appeared to understand and recall everything very well, and when the officer asked defendant whether he understood his rights, defendant responded affirmatively. Ruffin v. State, 992 So. 2d 1165 (Miss. 2008).

There was substantial evidence to support a trial court's finding that defendant was adequately advised of his constitutional rights under Miranda because only a short time transpired between the time that an agent with the Mississippi Bureau of Narcotics read defendant his Miranda rights and a police officer's questioning. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

Although a voluntary statement made by defendant was in violation of the Fifth and Sixth Amendments because defendant had asked for an attorney, it was properly used for impeachment purposes during a murder trial; moreover, the failure to provide a limiting instruction on such was not error since defendant did not make such a request, and therefore a motion for a mistrial was properly denied. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

Defendant voluntarily went to the police station, was told about the 15-year-old victim's accusations that defendant had fondled him, and agreed to give a statement to police, he was not placed under arrest before questioning, and the officers emphasized that he was free to end his questioning at any time; thus, defendant was not in custody and therefore was not entitled to the Miranda protections, but out of caution the officers did read defendant his Miranda warnings, and he signed a waiver indicating that he fully understood those rights, and therefore his statement to the police before his arrest was admissible. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Trial court did not err in admitting defendant's confession to the police that he was walking by the victim's business and decided to take some things as defendant blurted out the statement after he was read his Miranda rights. Wess v. State, 926 So. 2d 930 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 218 (Miss. 2006).

38. — Voluntariness of confession, self-incrimination.

Trial court's ruling that defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights was supported by substantial evidence because a police officer's threat to arrest defendant's wife if defendant did not confess that drugs belonged to him was insufficient to render defendant's statement involuntary because probable cause existed to arrest defendant's wife because cocaine was found in the kitchen, a common area of the home, and defendant's wife had been living in the home and was listed on the lease. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

43. —Guilty plea generally, self-incrimination.

In defendant's "petition to enter plea of guilty," he swore that his lawyer had advised him of the elements of the charge to which defendant was pleading and that he had not been forced, intimidated or coerced in any manner to plead guilty. The colloquy also showed that he was advised that by pleading guilty, he was waiving his right to a trial by jury, the right to protection against self-incrimination, and the right to confront witnesses; thus, the trial court did not err in finding that his plea was freely, voluntarily, understand-

ingly, and knowingly made. Willcutt v. State, 910 So. 2d 1189 (Miss. Ct. App. 2005).

44. — Voluntariness of guilty plea, self-incrimination.

In defendant's manslaughter case, his confession was voluntary because defendant conceded that he gave the statement voluntarily, and he was given Miranda warnings and understood his rights; an officer testified that he was outside of the interrogation room, another officer and defendant came out of the room, and the officer told him that defendant had said "he just lost it and shot her and he would show us where the body was." McBride v. State, 934 So. 2d 1033 (Miss. Ct. App. 2006).

46. — Physical evidence, self-incrimination.

Because defendant's Fifth Amendment right against self-incrimination was not violated when defendant gave her statements to the officers that evidence of the murders could be found at the county dump, the trial court did not err in denying her motion to suppress that evidence as fruit of the poisonous tree. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

50. — Waiver of rights, self-incrimination.

Defendant called the State witness on her cell phone immediately after the shooting and made incriminating admissions, and approximately a month after the shooting, law enforcement provided defendant with Miranda warnings, and upon being so advised, he chose not to exercise his right to remain silent. Instead, he made oral statements to law enforcement disclaiming his connection to the shooting, which was admissible under Miss. R. Evid. 801(d)(2); therefore, the case presented no violation of post-Miranda silence. Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

Pursuant to the Fifth Amendment, defendant's statements were properly obtained in accordance with her Miranda rights because the police stopped questioning her when she stated that she did not want to answer questions, she waived her right to remain silent, she did not explicitly request that she be provided counsel, and she initiated one interview with the police. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

There was substantial evidence that defendant understood English and validly waived his Miranda rights because (1) he had completed nine years of formal education, which included two years of English classes; (2) all conversations between defendant and the arresting officers were in English; (3) the arresting officers testified that defendant never asked the police officers to explain any English words to him; (4) all of the officers testified that defendant understood and spoke the English language without an interpreter; (5) defendant was given a chance to read the Miranda waiver form before signing it; (6) he gave his statement in English; (7) defendant was not threatened or intimidated, nor was he offered any promises, hopes, or rewards for his confession; and (8) defendant's estranged wife testified that she and defendant communicated in English during their marriage. Chim v. State, 972 So. 2d 601 (Miss. 2008).

51. Due process — In general.

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

Identification of defendant was not impermissibly suggestive because the men in the photographs were all African-American males, had the same build, and possessed the same facial features in accor-

dance with the store clerk's description of the armed robber. The fact that defendant was the only individual wearing a coat was a minor difference and did not rise to the level of impermissible suggestion. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Defendant's convictions for three counts of manslaughter for his actions in 1964 were appropriate in part because his due process rights were not violated; he claimed that he suffered actual prejudice due to deceased witnesses and deteriorated memories but he failed to show how he was prejudiced because all six of his witnesses testified live at his 2005 trial and he did not suggest any witness he was unable to call on his behalf as a result of the 41-year delay. Killen v. State, 958 So. 2d 172 (Miss. 2007).

70. —Jurisdiction, due process.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

72. — Notice and hearing, due process.

Defendant's due process rights were not violated by a contempt conviction because a trial court gave defendant notice and conducted a hearing where she was allowed to present evidence, even though not required for direct contempt. In re Hampton, 919 So. 2d 949 (Miss. 2006), writ of certiorari denied by 547 U.S. 1131, 126 S. Ct. 2042, 164 L. Ed. 2d 784, 2006 U.S. LEXIS 3868, 74 U.S.L.W. 3639 (2006).

Denial of the inmate's petition for writ of habeas corpus was affirmed as (1) Miss. Code Ann. § 47-7-17 did not create a constitutionally protected liberty interest in parole, (2) the inmate waived his right to argue that he was prejudiced by the Parole Board's failure to publish notice of his parole hearing as it was not raised below, and (3) the inmate did not argue in his petition that he had ever been denied the opportunity to call witnesses or that the Parole Board refused to listen to their testimony. Way v. Miller, 919 So. 2d 1036 (Miss. Ct. App. 2005).

73. —Discovery, due process.

Defense counsel was given every opportunity to listen to the tapes and view the transcripts, as all evidence was made available to defense counsel, and no evidence was intentionally withheld by the State; additionally, when applying the four-part test to determine if Brady violations occurred in the inmate's case with respect to two witnesses, the trial court finding on that issue was supported by the record. Therefore, all exculpatory issues raised by the inmate regarding those two witnesses were without merit, and there was no violation of defendant's due process rights. Manning v. State, 929 So. 2d 885 (Miss. 2006).

75. — Rights of indigent defendant, due process.

DNA testing of the knife used in an assault would have been of little assistance to defendant and therefore was not necessary to preserve defendant's due process guarantees as both the victim and the eyewitness testified that defendant attacked the victim, and if the blood on the knife was found to be defendant's blood, it would have added little support to his theory of self-defense; thus, defendant was not denied a fair trial nor was his request for expert assistance necessary to preserve his due process guarantees. Grubbs v. State, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

77. —Judicial impartiality, due process.

Federal district court correctly denied state death row inmate's habeas corpus

petition; comments by a deputy sheriff called as a venireman, stating that he could not be fair because he had seen crime scene photos in the course of his job, did not taint the resentencing jury or deprive petitioner of due process because the deputy was excused as a juror and because there was no indication that the rest of the venire heard his comments. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

79. Trial conduct, due process.

Appellant was not denied due process where a trial court had sentenced him as a habitual offender without submitting the issue of his status as a habitual offender to the jury, because it was clear from federal case law that a jury was not required to pass upon an enhanced penalty due to prior convictions and the appellant's sentence was within the limits of Miss. Code Ann. § 99-19-83, as construed by Mississippi law. McNickles v. State, 979 So. 2d 693 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 979 So. 2d 691, 2008 Miss. LEXIS 176 (Miss. 2008).

Federal district court correctly denied state death row inmate's habeas corpus petition; although the prosecutor improperly invoked the position of his office by telling the jury that the case was a "rare" one in which he felt he must seek the death penalty, a state court correctly found that no prejudice resulted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Appellate court found no merit to defendant's claim that he did not receive a fair trial on the ground that the State failed to provide him with a copy of the original police report where the only alteration made to the police report was the addition of the word "recovered" written next to the entry regarding the victim's credit card. The trial court allowed defendant additional time to restructure his cross-examination of the officer who wrote the report. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

91. Sentence and punishment — In general.

Defendant's post-conviction motion was properly dismissed because while defendant retained the ability to challenge the legality of the incarceration, despite entering into an agreed sentencing order whereby defendant agreed not to file an appeal or a motion for post-conviction collateral relief, nothing in the record showed that defendant was illegally confined. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Federal district court correctly denied state death row inmate's habeas corpus petition; pretrial publicity was not pervasive enough to prejudice the resentencing jury because resentencing occurred years after the initial guilt and sentencing phases and merited only passing news coverage, even though media coverage of the trial itself was substantial. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Cited in: Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

RESEARCH REFERENCES

ALR. Adoption and application of "tainted" approach or "dual motivation" analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated. 15 A.L.R.6th 319.

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

AMENDMENT VI

JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

JUDICIAL DECISIONS

105. — Trial strategy rather than ineffectiveness of counsel, assistance of counsel.
106. — Failure or refusal to present evidence as ineffectiveness of counsel, assistance of counsel.
107. — Inadequate preparation for trial as ineffectiveness of counsel, assistance of counsel.
107.5. — Failure to file motion for severance as ineffective assistance of counsel, assistance of counsel.
108. — Jury selection as instance of ineffective assistance of counsel, assistance of counsel.
109. — Failure to object to indictment as ineffectiveness of counsel, assistance of counsel.
110. — Failure to object to evidence as ineffectiveness of counsel, assistance of counsel.
111. — Failure to call witnesses as ineffectiveness of counsel, assistance of counsel.
112. —Failure to object to argument of state as ineffectiveness of counsel, assistance of counsel.
113. — Failure to object to or request instructions as ineffectiveness of counsel, assistance of counsel.
114. —Sentencing phase procedures as indicative of ineffectiveness of counsel, assistance of counsel.
116. — Totality of circumstances demonstrating ineffectiveness of counsel, assistance of counsel.
117. — Different outcome likely as proof of ineffectiveness of counsel, assistance of counsel.
119. — Burden of proof of ineffectiveness of counsel, assistance of counsel.
120. — Sufficiency of evidence of ineffectiveness of counsel, assistance of counsel.
121. — Post-conviction proceedings, assistance of counsel.
121.5 — Failure to file motion for reconsideration as ineffective assistance of counsel, assistance of counsel.
122. Change of venue.
125. Other particular homicides.
126. — Other particular circumstances.

1. In general.

Although the state failed to identify the nurse who drew defendant's blood, and defendant was consequently unable to cross-examine her, his Sixth Amendment right to confront witnesses was not violated. The Sixth Amendment does not require that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person or as part of the prosecution's case; rather, gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

Defendant's conviction for murder was appropriate because he was specifically instructed on his right to testify in his own defense and the trial judge was careful to inform defendant that the decision was for defendant alone to decide; the record did not demonstrate that defendant was refused an opportunity to present a defense, and the record and arguments demonstrated that defendant's counsel was satisfied that defendant received what he asked of the trial judge. McCain v. State, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Defendant's right to a fair trial was not denied where the prosecutor's statements, while rambling and tending to bring in extraneous considerations, largely were focused on the need to consider that drugs were dangerous and possession should be a crime; the evidence offered to support conviction was of a person signing for delivery of marijuana, without any evidence that he was otherwise involved in the drug trade; the challenged arguments were not in the "send a message" category and the statements did not interfere with the fairness of the trial. Shanks v. State, 951 So. 2d 575 (Miss. Ct. App. 2006).

2. Information of accusation.

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to

specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006).

9. Mental examination and treatment.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

10. Guilty plea, generally.

Dismissal of the inmate's motion for post-conviction relief was proper because there were no Sixth Amendment jury issues since he pled guilty and never asserted his right to a jury trial. Smith v. State, 933 So. 2d 1008 (Miss. Ct. App. 2006).

11.5. Instructions.

It was improper to convict defendant of using her mother's money without her consent in violation of the Mississippi Vulnerable Adults Act of 1986, Miss. Code Ann. § 43-47-19 because although the indictment sufficiently informed defendant of the crime and the conduct the grand jury believed constituted the crime, the trial court erroneously issued a jury instruction that materially conflicted with the indictment's language; the wording of the indictment suggested that the grand jury believed defendant's use of the money was improper only if the money was used without the mother's consent, but at trial, the State produced no evidence that defendant had used her mother's money without her consent, and several witnesses testified that she, in fact, had obtained her mother's consent. Decker v. State, — So. 2d —, 2011 Miss. LEXIS 296 (Miss. June 16, 2011), opinion withdrawn by 2011 Miss. LEXIS 324 (Miss. June 30, 2011).

14. Sentence and punishment, generally.

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Petitioner's argument that the capital sentencing statute, Miss. Code Ann. § 99-

19-101, did not permit waiver of a jury for sentencing purposes was without merit because although § 99-19-101 provided for sentencing only by a jury in capital cases, § 99-19-101 specifically provided that a jury could be waived by a defendant in writing. Also, the record showed that petitioner's waiver was knowingly and intelligently made because she was advised as to the sentencing options available to a jury, or a judge sitting without a jury, after her capital murder conviction, and she signed a waiver stating that she understood that she could be sentenced in the discretion of the trial judge to death, life imprisonment without eligibility for parole, or life imprisonment as provided in § 99-19-101(1). Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

15. Speedy trial — In general.

22. — Delay attributable to defendant, speedy trial.

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Defendant's constitutional right to a speedy trial was not violated where the state established good cause for the trial delay; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

23. — Delay attributable to state, speedy trial.

Aggravated assault conviction and sentence were affirmed where counsel was not ineffective because the defendant provided no evidence that proved he suffered harm as a result of his attorney not objecting to the State's leading questions or that had his attorney objected to the State's leading questions the outcome would have been different and trial counsel's failure to object to leading questions by the State could have been a trial strategy. Bullard v. State, 923 So. 2d 1043 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 160 (Miss. 2006).

24. — Delay unattributable to defendant or state, speedy trial.

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

29. — Crowded docket, speedy trial.

Defendant's conviction was affirmed because while it was clear that defendant

was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10 (Miss. Ct. App. 2010), affirmed by 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

32. — Guilty plea, speedy trial.

Although defendant argued that he was deprived of his right to a speedy trial, a valid guilty plea operated as a waiver of all non-jurisdictional defects or rights incidental to trial and this included a defendant's right to a speedy trial. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Inmate's petition for post-conviction was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

34. — Prejudice to defendant, speedy trial.

Defendant was not denied his right to a speedy trial, even though the 14-month delay between the placement of the detainer and defendant's trial date was presumptively prejudicial, because defendant did not file a motion to dismiss for the lack of a speedy trial until one year after his arrest and there was no evidence to support defendant's claim of lost witnesses or his claim that the delay negatively affected the conditions of his confinement under his previous sentence. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Most significant factor was that defendant failed to demonstrate how his incarceration and the 31-month delay between his arrest and trial caused him any actual prejudice. Thus, per the Barker factors, the appellate court found that there was no violation of defendant's constitutional right to a speedy trial; secondly, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert that right until well after the statutory deadline had passed, and because his assertions as to a denial of his speedy trial rights would not have resulted in a different outcome to the case, counsel was not ineffective in failing to raise said issues. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Trial court carefully and patiently examined the testimony and other evidence and provided defendant with ample opportunity to provide evidence that the delay was not attributable to him or good cause; defendant failed to suggest any evidence, potential witness, or case theory which escaped his reach because of the delay, and there was no basis to hold that the delay in the proceedings impaired defendant's defense of the case. Stark v. State, 911 So. 2d 447 (Miss. 2005).

38. — Failure to assert rights, speedy trial.

Defendant's claims for speedy trial violations neither established a plain-error basis to justify further appellate review, nor evidenced a miscarriage of justice; regarding delay, the record reflected that defendant assented to the entry of nine separate "Agreed Orders of Continuance" and filed numerous pre-trial motions, and defendant did not suffer prejudice due to a change in a witness's testimony. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Defendant's right to a speedy trial did not automatically warrant reversal of defendant's conviction for an alleged violation of the right; rather, a balancing test was conducted, and moreover, defendant's demand for a dismissal of the charge based on an alleged violation of the right to a speedy trial was not the same as the demand for a speedy trial. Guice v. State, 952 So. 2d 129 (Miss. 2007), writ of certiorari denied by 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515, 2007 U.S. LEXIS 12594, 75 U.S.L.W. 3274 (2007).

Defendant was not denied his right to a speedy trial where he never asserted the right to a speedy trial, and the record showed that he was trying to avoid a trial, rather than assert his right to a speedy trial. He did not appear at his first scheduled trial and twice fired attorneys shortly before other trial dates were set to occur. Bindon v. State, 926 So. 2d 222 (Miss. Ct. App. 2005).

38.5. — Right not violated, speedy trial.

Other than his assertion of prejudice, defendant offered no substantiation for his claim of prejudice; having conducted an analysis of the Barker factors, and considering the case in its totality, there was no actionable violation of defendant's constitutional right to a speedy trial. Clark v. State, 14 So. 3d 779 (Miss. Ct. App. 2009).

Defendant's speedy trial rights were not denied by a sixteen-month delay because there was nothing in the record to suggest any impairment of the defense. None of the witnesses for either the State or defendant were unavailable due to the delay in his trial, and there was also no claim of loss of evidence. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In defendant's driving under the influence case, defendant's right to a speedy trial was not violated because, assuming arguendo that the applicable date of arrest was April 9, 2004, a "presumptively prejudicial" 473-day period of the delay was attributable to the State, however, defendant failed to make timely demand for a speedy trial or to establish any prejudice to his defense as a result of the delay. Murray v. State, 967 So. 2d 1222 (Miss. 2007).

46. —Review, speedy trial.

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

49. Impartial jury — In general.

Trial court properly denied defendant's motion to quash a venire because defendant did not show that the exclusion of persons with surnames beginning with "T-Z," which was due to an algorithm used by the county's computer system, disproportionally affected any distinctive group in the county; defendant failed to meet the burden of showing that the jury did not represent a fair cross-section of the community. Presley v. State, 9 So. 3d 442 (Miss. Ct. App. 2009).

Appellant inmate asserted that he was denied his constitutional rights to notice and jury trial guarantees under the Sixth Amendment but that issue was raised on direct appeal and decided adversely to the inmate; he had been convicted of capital murder and sentenced to death. The inmate did not demonstrate a novel claim or a sudden reversal of law relative to these issues that would have exempted a single one of those claims from the procedural bar of res judicata; in fact, he again relied on Apprendi just as he did on direct appeal but the issue was without merit and cur-

rently barred. Havard v. State, 988 So. 2d 322 (Miss. 2008).

There was no evidence of prejudicial effect on the jury by the judge's comments concerning the drug court where the defense did not object once the jury was empaneled and the jury indicated it would fairly decide the case on the facts and law presented; defendant presented no evidence that the judge's comments had a prejudicial effect on the jury except for the fact that they ultimately found him guilty, and the content of the remarks made by the judge were merely informative and could not be deemed inflammatory. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

50. —Statutes and court rules, impartial jury.

Defendant had no constitutional right to a jury trial on the issue of habitual-offender status. Johnson v. State, 29 So. 3d 738 (Miss. 2009).

54. — Racial make-up of jury, impartial jury.

Defendant's convictions for murder, sexual battery, and first degree arson were appropriate because the venire from which the jury was selected was produced by a computer that randomly selected names from the voter rolls and defendant made no objection to the selection process, nor did he present any evidence indicating systematic exclusion of blacks in the jury-selection process; defendant objected only to the result of the selection process, not the manner in which the jury was drawn. Haynes v. State, 934 So. 2d 983 (Miss. 2006), writ of certiorari denied by 549 U.S. 1306, 127 S. Ct. 1874, 167 L. Ed. 2d 365, 2007 U.S. LEXIS 3602, 75 U.S.L.W. 3511 (2007).

In defendant's trial for the sale of cocaine, defendant failed to make a prima facie showing that the fair cross-section requirement was violated; defendant also failed to show that there was a systematic exclusion of blacks from the jury pool. Yarbrough v. State, 911 So. 2d 951 (Miss. 2005).

55. —Voir dire, impartial jury.

Federal district court correctly denied state death row inmate's habeas corpus petition; comments by a deputy sheriff called as a venireman, stating that he could not be fair because he had seen crime scene photos in the course of his job, did not taint the resentencing jury or deprive petitioner of due process because the deputy was excused as a juror and because there was no indication that the rest of the venire heard his comments. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

56. —Peremptory challenges, impartial jury.

Federal district court correctly denied state death row inmate's habeas corpus petition; although defense counsel was forced to exercise a peremptory challenge to exclude a potential juror who should have been excluded for cause, no federal constitutional error occurred because no violation of the state law governing peremptory challenges was shown and because the challenged juror did not ultimately sit on the jury. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

61. — Race-neutral exercise of peremptory challenges, impartial jury.

During voir dire, defendant challenged four of the state's peremptory strikes against African-American jurors, claiming that they violated the Batson rule requiring the state to provide race-neutral reasons for exercising peremptory strikes; the state provided race neutral reasons for striking four African-American veniremen and thus the state's use of its peremptory strikes against the four veniremen were not pretextual or discriminatory. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

61.5 — Race-neutral reason for exclusion, impartial jury.

In a Batson challenge, the defense did not met its burden of showing that the facts and circumstances giving rise to the inference that the prosecutor exercised the peremptory challenges with a discriminatory purpose because the State offered reasons for its peremptory strikes of black venire persons that the trial court considered race-neutral, and the defense failed to rebut those reasons. Chamberlin v.

State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

62. —Capital cases, impartial jury.

Trial court did not abuse its discretion in striking two jurors for cause because: (1) the first juror repeatedly switched positions as to whether she supported or opposed the death penalty, and gave wavering responses when asked whether she could vote for the death penalty; and (2) the second juror responded on her questionnaire that she could not vote for the death penalty, and the trial judge had ample opportunity to observe the second juror's responses and demeanor during voir dire, which he found sufficient to determine that her feelings toward the death penalty would substantially impair her duties to perform as a juror. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

64.5 Appearance of accused in handcuffs, shackles or prison clothes.

In defendant's capital murder case, defendant's right to a fair trial was not violated where the momentary, inadvertent and fleeting sight of defendant in shackles by potential jurors, while being transported into the courtroom, absent prejudice shown, did not require a mistrial. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

65. Confrontation of witnesses — In general.

Defendant's Sixth Amendment right to confront his accuser was not violated by the court's admission of prior statements by the victim to law enforcement which were inconsistent with his testimony on direct examination and which the victim disclaimed at trial as having been false; victim's appearance on the witness stand at trial provided defendant with the opportunity to confront and cross-examine such victim, which was all that is required by the Sixth Amendment Confrontation Clause. Smith v. State, 25 So. 3d 264 (Miss. 2009).

Trial court permitted defendant to produce evidence of his sons' assault upon the victim through cross-examination of several other witnesses and the trial court's decision not to allow defendant to call the victim's stepbrothers did not deprive defendant of an ample opportunity to present his theory of the case. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Introduction of codefendant's statement was harmless beyond a reasonable doubt where defendant made no effort to suppress his own statements and the only objection made to the introduction of his statement was his joining codefendant's objection on the grounds of hearsay and confrontation; no objection was made which would challenge either the truthfulness, or the voluntariness, or the reliability of defendant's statements, and defendant's confession was the most probative and damaging evidence admitted against him, and it constituted direct evidence of the facts related to the victim's murder; defendant's own statements concerning his participation in the robbery and murder of the victim were uncontradicted and unchallenged, and the evidence in the record was overwhelming and was sufficient to support the jury's verdict. Smith v. State, 986 So. 2d 290 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part because defendant suffered no substantial prejudice in that he was not denied his constitutional right to confront witnesses based on the admission of audiotaped telephone recordings of the pre-drug-buy conversations between the confidential informant and unknown persons. Neither the confidential informant nor the law enforcement officials knew the identity of the voices on the tape, other than the confidential informant, nor did the State or any of its witnesses attempt to state or imply that one of the unidentified voices on the tape recording was defendant's. Brown v. State, 969 So. 2d 855 (Miss. 2007).

Victim's mother's testimony about a letter defendant wrote to her while he was incarcerated was an admission by a party-

opponent, not considered hearsay, and thus admissible under Miss. R. Evid. 801(d)(2); there could be no violation of the confrontation clause when defendant was the person making the incriminating statement, as defendant could not cross-examine himself, and there was nothing in the testimony about the letter which was an absolute admission of guilt on the part of defendant. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper because there was no indication that a witness's co-worker's comments to the witness regarding defendant's identity were "testimonial" within the meaning established by Crawford since the co-worker did not make his comments during a preliminary hearing, before a grand jury, at a former trial, or during a policy interrogation; the co-worker's comments took place between two co-workers at a time when defendant was not a suspect to the murder because, at the time of the comments, no one was aware that the victim had been murdered. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

68. —Discovery, confrontation of witnesses.

Defendant's right to a fair trial was not violated where defendant could not show that a discovery violation was committed by the State or that he was prejudiced in any way when there was nothing in the record showing knowledge on the part of the State of either of the two defense witnesses, and defendant made no showing how the police could have known of them and thus failed to disclose them; even though defendant claimed prejudice because police and/or the DA's office failed to find certain witnesses who would have helped him in his defense, he put on no proof at trial of an alleged inadequate investigation. Morris v. State, 927 So. 2d 744 (Miss. 2006).

69. — Child abuse, confrontation of witnesses.

There was no plain error in the failure to either make a Sixth Amendment objection or at least to have such an objection clearly preserved on the record; thus, the court determined that defendant's argument for the first time on appeal that the introduction of a video demonstrating a "shaken baby" episode violated his Sixth Amendment right to confront witnesses was without merit. Rumfelt v. State, 947 So. 2d 997 (Miss. Ct. App. 2006).

In a sexual battery of a child case, the victim's grandmother, the babysitter, the psychotherapist, and the doctor were not working in connection with the police; further, their statements were not made for the purpose of aiding in the prosecution because (1) the victim's unsolicited statements were made to his grandmother and his babysitter for the sake of his well-being and not for the purpose of furthering the prosecution; and (2) his statements to the psychotherapist and the doctor were for the purpose of seeking medical and psychological treatment. The victim was taken to the psychotherapist and the doctor at the family's request and not sent there by police to further their investigation; thus, their testimony did not violate the Confrontation Clause. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

In a sexual battery of a child case, the statements testified to by a police officer and a detective were testimonial and should have been excluded under the Confrontation Clause; therefore, the trial court erred in admitting them. However, similar testimony was properly admitted from four other witnesses; therefore, the testimony was duplicative, and the error was harmless. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

70. —Child witnesses, confrontation of witnesses.

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mis-

trial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Trial did not violate a defendant's confrontation rights in admitting a child victim's video statement where he was allowed to cross-examine the victim after she testified in court and he was given an opportunity for re-cross-examination after the statement was entered. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

72. — Hearsay, confrontation of witnesses.

Neighbor's hearsay testimony did not violate defendant's Sixth Amendment, U.S. Const. Amend. VI, right, because only testimonial hearsay was capable of violating the Sixth Amendment; the victim's child's statements to the neighbor were not made for any prosecutorial purpose and was nontestimonial, and the investigator's testimony was responsive to questions from the State as to why he contacted the Department of Human Services to pick up the children from the scene. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Because defendant could have recalled the victim after the admission of the Miss. R. Evid. 803(25) testimony but chose not to do so, the admission of this hearsay evidence did not violate his Sixth Amendment, U.S. Const. Amend. VI, right to confront his accuser. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

In a sexual battery and touching of a child for lustful purposes case, as the trial court was correct in its determination that

the statements made by the child to her mother and to her therapist were nontestimonial in nature, they did not trigger the protections of the confrontation clause, and defendant's right to confrontation was not violated. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

While the trial court erred in allowing a store clerk's hearsay testimony under Miss. R. Evid. 802 regarding another person telling her defendant's name, it was harmless because the only testimony of that witness that was prejudicial to defendant was all admissible in that the prejudicial feature of the witness's testimony was that she identified defendant, even if she did not know him by name, and she noticed the vehicle that he drove, even if she did not know it to be the victim's. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Defendant claimed that his trial counsel was ineffective, but as defendant voluntarily assumed the role of trial counsel, he could not claim that his adviser failed to provide him with adequate representation; simply put, defendant could not benefit on appeal from his own ineptitude at trial. Jackson v. State, 943 So. 2d 720 (Miss. Ct. App. 2006).

74. — Unavailable witnesses, confrontation of witnesses.

Testimony that defendant had a sexual relationship with one of the victims, his step-son's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause. Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Defendant's confrontation rights under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 were not compromised in capital murder case because the trial court had determined that the victim, who was the declarant, was unavailable and that the evidence in question showed adequate indicia of reliability and trustworthiness. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

76. —Test results, confrontation of witnesses.

While the State's expert was accepted as an expert in toxicology, there was no testimony that she was in any way involved in the testing of defendant's blood specimen or that she was actively involved in the production of the report and had intimate knowledge of the analyses even though she did not perform the tests first hand, and the trial court erred in admitting the test results without evidence that the expert actually performed the test or participated in its analysis; however, because overwhelming evidence was presented to the jury that defendant was intoxicated, this error was harmless. Debrow v. State, 972 So. 2d 550 (Miss. 2007).

76.5 — Medical reports, confrontation of witnesses.

Defendant's conviction for DUI maiming was proper because he was not denied his right to confrontation. The trial judge properly ruled that the deputy's motive or intent for obtaining consent from defendant was irrelevant, and evidence of it should not have been presented to the jury; additionally, defendant never properly moved the trial court to make an on-the-record finding outside the presence of the jury, nor did defendant ever proffer any evidence that he was suffering from diminished capacity to consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

"Abuse record" prepared by attending physician was not created for the purpose of aiding the prosecution and was not testimonial, but rather was used in the treatment of the abuse viction, defendant's child, and therefore its admission at trial did not violate defendant's right to confront witnesses testifying against her

under U.S. Const., Amend VI. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

77. — Cross-examination, confrontation of witnesses.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. §§ 97-3-19(2)(f), he argued unsuccessfully that the prosecution committed misconduct by improperly cross-examining a mitigation witness, thereby depriving him of a fundamentally fair sentencing. The witness, a former teacher, was questioned about defendant's drinking habits and illegal drug use, and, while defendant argued that there was no evidentiary basis for that line of questioning, the questioning was based a mental health evaluation that was properly before the court; since the questioning of the witness was to test her knowledge of defendant's habits, there was no battle of opinions between the doctor who prepared the report and the witness such that the doctor had to be called as a witness to avoid a violation of the Confrontation Clause. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; defendant's right to confrontation was not violated. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the error was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

Defendant's convictions for murder and aggravated assault were proper where he was not denied his constitutional right to confrontation because he was permitted to cross-examine the living victim as well as all other witnesses who testified for the State. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Victim testified at the trial, and defendant had the opportunity to extensively cross-examine him, and therefore his right to confront witnesses against him under the Sixth Amendment was not violated; the videotape of the victim's statement to the police was not offered as direct evidence, but was offered as a prior consistent statement under Miss. R. Evid. 801(d)(1)(B) to refute defense counsel's implication that the tape had been fabricated, and the witness testified and was cross-examined. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Because defendant lacked the opportunity to cross-examine his co-defendant, the trial court erred in allowing the police officer to testify concerning the co-defendant's statement; however, the erroneous admission of the statement was harmless error where the impact of the erroneously admitted statement was so insignificant that it could not have contributed in any meaningful way to the guilty verdict. Bynum v. State, 929 So. 2d 312 (Miss. 2006), writ of certiorari denied by 549 U.S. 962, 127 S. Ct. 403, 166 L. Ed. 2d 286, 2006 U.S. LEXIS 7652, 75 U.S.L.W. 3195 (2006).

Defendant's conviction for fondling was appropriate because a forensic examiner's

testimony was not in violation of the Confrontation Clause of the Sixth Amendment since the examiner was available to testify as a witness and defendant did have the opportunity to cross-examine him. Higdon v. State, 938 So. 2d 340 (Miss. Ct. App. 2006).

78. —Collateral matters, confrontation of witnesses.

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross examine one victim regarding the intoxication. The trial court properly balanced the probative and prejudicial effects of the evidence under Miss. R. Evid. 403, and found that the proposed testimony would have had no probative value because the possible testimony of marijuana usage was not linked to a propensity for violence; also, the prejudicial fact that the possible intoxication was of an illegal substance — marijuana — and not mere alcohol, further outweighed any probative effect. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

79. Compulsory process.

Where defendant's wife was his co-defendant, both were charged with drug possession, co-defendant moved for a directed verdict at the close of the State's case, and the trial court delayed granting co-defendant's motion until the conclusion of the presentation of all of the evidence, defendant did not assert a valid claim in arguing that his rights under the Sixth and Fourteenth Amendments were violated because, if co-defendant had been timely discharged, she would have testified on his behalf and given testimony that exculpated him of the charged offense. Defendant could cite no authority for his standing to claim trial error for the failure to grant a co-defendant's motion for a directed verdict, and the trial court would not be placed in error on an alleged untimely grant of a motion for a directed verdict in favor of a co-defendant based on defendant's compulsory process argument. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (U.S. 2009).

Defendant's conviction for manslaughter was appropriate because defendant was guilty of a willful discovery violation since he offered no reason whatsoever for not disclosing the statements at issue, even though the case had been pending for approximately four years; because defendant's discovery violation was willful, his Sixth Amendment right to compulsory process was not violated. Lindsey v. State, 965 So. 2d 712 (Miss. Ct. App. 2007).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in failing to grant defendant's motion for a continuance since the record contained no affidavits or any other indication that anyone knew a probationer's whereabouts, and there was no indication that the probationer would likely have been available at some time in the future. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's discovery violation in not providing a defense witness list to the State until the morning that the trial began was willful and motivated by a desire to obtain a tactical advantage, and therefore, the circuit court properly excluded the evidence and did not violate the Compulsory Process Clause. Morris v. State, 927 So. 2d 744 (Miss. 2006).

80. Assistance of counsel — In general.

Defendants were not denied the effective representation of counsel when the court properly denied a continuance to allow defendants' counsel to prepare for trial after he took the case a few days before trial because defendants pointed to no witness whose questioning might have made a difference, nor did they point to anything in the documents that could have been discovered had counsel had more time to review the case. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

Defendant was not denied his Sixth Amendment right to counsel because defendant entered a valid guilty plea, waiving defendant's rights under the Sixth Amendment, and defendant had appointed counsel from the time charged until defendant entered a guilty plea and had also retained counsel at the time defendant entered a plea. Frith v. State, 984 So. 2d 316 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 293 (Miss. June 12, 2008).

Defendant claimed ineffective assistance of counsel during his trial for possession of marihuana and cocaine, and possession of a weapon; however, defendant merely raised the issue in his brief without pointing to any part of the record that would substantiate his claim; as such, the issue was without merit. Chester v. State, 935 So. 2d 976 (Miss. 2006).

Appellant's conviction for two counts of sexual battery was upheld because he did not allege that he suffered any untoward consequences because he did not have pre-indictment counsel, aside from the fact that he was indicted; he claimed only that, if counsel had been available, counsel could have objected to the hearsay testimony introduced during the grand jury proceedings, and could have filed a motion to dismiss. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

In an armed robbery case, defendant's counsel was not ineffective by spending as much time as he did attempting to show that defendant left his fingerprints at the scene on an earlier occasion as defendant's fingerprints were the only physical evidence tying defendant to the crime scene; had defense counsel succeeded in establishing that defendant left his fingerprints at some time unconnected with the robbery, then his alibi would have been strengthened. As such, the actions of defendant's counsel concerning the fingerprint evidence fell within the wide range of reasonable professional assistance. Madison v. State, 923 So. 2d 252 (Miss. Ct. App. 2006).

In a possession of cocaine case, defendant was not denied effective assistance of counsel when his attorney failed to object to the jurisdiction of the trial court after the State amended the indictment to include the habitual offender charge. The trial court had jurisdiction under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, and the evidence showed that defendant was afforded a fair opportunity to present a defense and was not surprised with the habitual offender amendment, as required by Rule 7.09. Troupe v. State, 922 So. 2d 844 (Miss. Ct. App. 2006).

Defendant's counsel was not ineffective because a potential juror made no indication during the extensive questioning following her objectionable comments that in any way revealed that she would be unable to be fair and impartial in deciding whether defendant was guilty or not guilty, and if found guilty, in deciding the appropriate sentence; given the multiple opportunities that the potential juror had to notify the trial court or the attorneys of any potential problems she may have had in sitting on the jury, trial counsel's performance was not so deficient that it prevented counsel from functioning as guaranteed by the Sixth Amendment. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Where defendant gave false names to police upon being detained, it was not error to allow impeachment of defendant at trial with statements he made to police prior to being given his Miranda warnings. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Denial of the inmate's petition for post-conviction relief was proper where he was not denied the effective assistance of counsel because the record reflected that he was represented by one of two attorneys during all parts of the plea and sentencing hearing. Nothing occurred following the departure of one attorney that would have been uniquely within his knowledge so as to make that representation inadequate. McBride v. State, 914 So. 2d 260 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 720 (Miss. 2005).

81. — Pro se representation, assistance of counsel.

When defendant waived his right to counsel and elected to proceed pro se but where the trial court appointed counsel to assist him during trial, the hybrid representation that defendant received during trial provided him with effective assistance because it was clear from the record that the two attorneys were not casual observers where they conducted voir dire, handled jury challenges, made numerous objections throughout trial, conducted cross-examination of witnesses, conducted the direct examination of witnesses, made a motion for a directed verdict, presented the closing argument in the guilty phase, represented defendant at sentencing, made the opening statement on behalf of defendant in the sentencing phase, conducted the examination of witnesses during the sentencing phase, and filed a motion for a new trial. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

81.5. — Plea proceedings as ineffective assistance of counsel, assistance of counsel.

Defendant's counsel was not ineffective during plea proceedings where the trial judge and defense counsel went to great lengths to lead defendant through the plea process and made sure that defendant's guilty plea to the sale of cocaine was intelligent and voluntary; defendant testified under oath, during the guilty plea, that defendant was satisfied with counsel's representation. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Since an inmate was unable to show that he was prejudiced by an attorney's failure to subpoena a witness in a plea negotiation, a claim of ineffective assistance of counsel failed in a petition seeking post-conviction relief. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. § 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such, a claim of ineffective assistance of counsel failed. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Appellate court found no merit to appellant's claims that his attorney deceived him into believing that he would receive a lighter sentence if he pled guilty, and that his attorney instructed him to lie to the trial court by stating that he had not been promised anything in return for his guilty plea where appellant had told the trial court that his plea was voluntary and that he was satisfied with the assistance of his attorney. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

Colloquy between defendant and the court showed the lack of merit in his claim that counsel was ineffective. During his plea colloquy, defendant stated that he was satisfied with the advice of his counsel and stated that his counsel had fully and completely explained the charges that he was facing and any defenses that he would have; nothing in the record indicated that defendant's counsel was deficient in any way, and defendant stated specifically that no one, including his attorney, had induced or coerced him into making his plea. Strohm v. State, 923 So. 2d 1055 (Miss. Ct. App. 2006).

Defendant's motion for post-conviction relief, filed after he pled guilty to two counts of murder, was properly dismissed without a hearing where counsel's advice that a trial could result in a guilty verdict and the death penalty did not support an argument of ineffectiveness; counsel had a

duty to inform defendant of the possible outcomes of conviction. Booker v. State, 954 So. 2d 448 (Miss. Ct. App. 2006).

Trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying petitioner an evidentiary hearing on his post-conviction petition because there was no evidence in the record other than his bald assertions that counsel performed inadequately; defendant's testimony at his sentencing hearing did not indicate any confusion as to the result of his guilty plea, and it also did not indicate any dissatisfaction with counsel. Knight v. State, — So. 2d —, 2006 Miss. App. LEXIS 808 (Miss. Ct. App. Oct. 31, 2006), opinion withdrawn by, substituted opinion at, modified by 983 So. 2d 348, 2008 Miss. App. LEXIS 145 (Miss. Ct. App. 2008).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because there was nothing in the record to overcome the presumption that defendant received effective assistance of counsel, as defendant acknowledged under oath in his petition to enter a plea of guilty that his lawyer did all that anyone could do to counsel and assist him, and that he was satisfied with the advice and help that he received. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion for post-conviction relief after he pled guilty to armed robbery because he stated in his plea colloquy that he had not been coerced into pleading guilty and that he was satisfied with the advice of his attorney. Counsel's advice that defendant plead guilty was clearly within the range of competence demanded of attorneys in criminal cases. Williams v. State, 922 So. 2d 853 (Miss. Ct. App. 2006).

Defendant's unlawful killing of the victim clearly met all of the elements outlined in Miss. Code Ann. § 97-3-47, and the jury would have been entitled to find him guilty of manslaughter on the record before the appellate court; there was no error in defendant's representation at the plea proceeding, much less any error so prejudicial to rise to the level required by Strickland and Bevill; thus, defendant failed to prove an exception to the procedural bar for post-conviction relief. Smith v. State, 922 So. 2d 43 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel where, when questioned by the trial judge as to whether he understood that he was entering into an Alford appeal, and if he understood its consequences, defendant answered affirmatively; defendant also answered affirmatively when asked if defendant understood the minimum and maximum sentences for the crimes to which he was pleading; it was clear that defendant was not entitled to relief and the trial court was correct in refusing to grant an evidentiary hearing. Cole v. State, 918 So. 2d 890 (Miss. Ct. App. 2006), writ of certiorari dismissed by 927 So. 2d 750, 2006 Miss. LEXIS 213 (Miss. 2006).

82. —Administrative proceedings, assistance of counsel.

Defendant's claim that his counsel was ineffective for failing to reassert a speedy trial violation when defendant's trial was rescheduled from November 2, 2002, to May 6, 2003, was rejected as the record contained no information about the delay. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

86. —Invocation of right, assistance of counsel.

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custo-

dial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

88. — Questioning of defendant after request for assistance of counsel.

Although a voluntary statement made by defendant was in violation of the Fifth and Sixth Amendments because defendant had asked for an attorney, it was properly used for impeachment purposes during a murder trial; moreover, the failure to provide a limiting instruction on such was not error since defendant did not make such a request, and therefore a motion for a mistrial was properly denied. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

91. — Substituted counsel, assistance of counsel.

Defendant's right to be represented by his choice of retained counsel was not violated when a trial court denied his motion for a continuance on the morning of trial so that he could discharge his substitute counsel and hire new counsel where there was adequate time between his original attorney's activation to Iraq and trial for him to retain other counsel. Sturkey v. State, 946 So. 2d 790 (Miss. Ct. App. 2006), writ of certiorari denied, writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), writ of certiorari denied by 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167, 76 U.S.L.W. 3165 (2007).

93. —Line up, assistance of counsel.

Defendant's assertion that his U.S. Const., Amend. VI, right was violated by having no counsel present at a photographic lineup was without merit and an accused did not enjoy the right to counsel during a photographic lineup. Christmas v. State, 10 So. 3d 413 (Miss. 2009).

In appellant's capital murder case, counsel was ineffective in regard to a lineup identification because attorneys presented affidavits that they were not present at the lineup, and the witness's identification of appellant was crucial to the State's case. Minimal efforts on the part of trial counsel could have confirmed the presence or non-presence of counsel at the lineup. Howell v. State, 989 So. 2d 372 (Miss. 2008).

94. — Guilty plea, assistance of counsel.

Defendant failed to show that defendant received ineffective assistance of counsel during a guilty plea proceeding because counsel did not coerce defendant into pleading guilty, but simply informed defendant of the likely outcome of the case, believing it would be in defendant's best interest to enter a guilty plea. Defendant, at 55 years old, was charged with four counts of fondling a child; each count carried a maximum penalty of fifteen years in prison. Mayhan v. State, 26 So. 3d 1072 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 58 (Miss. 2010).

Defendant's claim that his attorney rendered ineffective assistance of counsel because he led defendant to believe that he would be placed in the drug court program was without merit as during his guilty plea hearing, defendant swore that his lawyer had not promised him anything to get him to plead guilty and defendant swore that he was satisfied with the services of his attorney. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

Defendant did not receive ineffective assistance of counsel where in the petition to enter his guilty plea, defendant clearly

acknowledged that his sentence was up to the court and that he could receive zero to ninety years imprisonment; defendant indicated his satisfaction with his attorney's advice and recognized that if he had been told by his lawyer that he might receive a lighter sentence this was merely a prediction and not binding on the court. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Defendant did not demonstrate ineffective assistance of counsel where his guilty plea admitted all elements of a formal charge and operated as a waiver of all non-jurisdictional defects contained in an indictment; defendant was unable to name any witnesses that should have been interviewed and his attorney advised him of the maximum and minimum sentence. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

Trial counsel was not deficient in failing to inform defendant that he could have been charged with carjacking when neither defendant nor his trial counsel had any choice in the matter. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Defendant's trial counsel was not inefficient where defendant neither professed his innocence, nor called attention to the impairment of any defense as a result of not being informed of his ineligibility for parole; trial counsel informed defendant that a conviction for armed robbery carried with it ineligibility for parole. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Denial of the inmate's motion for post-conviction relief was proper in part because he failed to show the ineffective assistance of counsel, as there was no proof that his attorney did not explain the charges to him; to the contrary, the inmate twice swore under oath that his attorney explained the charges to him and that he understood them. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing where there was evidence that the victim's girlfriend poured boiling water on him, along with defendant's testimony that someone else committed this act, which was enough to raise a reasonable doubt that defendant committed the offense; this evidence may have changed the outcome had the parties gone forward. Hannah v. State, 943 So. 2d 20 (Miss. 2006).

Any advice by counsel that defendant would be eligible for parole was incorrect and constituted deficient performance, and having shown deficient performance, defendant had to prove that he would not have pled guilty but for the incorrect advice; if his attorney improperly advised him of his eligibility for parole, defendant was entitled to a hearing to investigate his claim that he would not have pled guilty but for the incorrect advice. Garner v. State, 928 So. 2d 911 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 252 (Miss. 2006), writ of certiorari denied by 549 U.S. 1060, 127 S. Ct. 677, 166 L. Ed. 2d 528, 2006 U.S. LEXIS 9138, 75 U.S.L.W. 3283 (2006), remanded by 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006).

Defendant did not carry his burden of proving that ineffective assistance of counsel led him to plead guilty to armed robbery when he otherwise would have asserted his innocence where defendant, in open court, had responded during his plea allocution that he was satisfied with the legal advice and services of his attorney. At no point in his plea of guilty and sentencing did defendant assert his innocence. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's petition; the inmate was unable to show that but for the ineffective assistance of counsel he would not have pled guilty because the inmate stated that he was pleased with his counsel's representation at the plea hearing. Further, the inmate's counsel had the armed robbery charge reduced to simple robbery. Ivy v. State, 918 So. 2d 84 (Miss. Ct. App. 2006).

Inmate failed to establish his claims that he was deprived of effective assistance of counsel because he was persuaded to plead guilty, and that his guilty plea was involuntary and was entered

after being ill advised by his counsel, as his counsel was obligated to advise him that the potential consequences of trial and conviction of both counts could be a maximum of 120 years imprisonment, and the inmate acknowledged that he had been informed that a guilty plea would waive his right to a public and speedy trial by jury, his right to confront adverse witnesses, and his right to protection against self incrimination. Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate did not establish that he was deprived of effective assistance of counsel during his plea hearing, because his mother and his sister testified that the inmate's attorney had told him that he would be pleading guilty to simple assault and would be sentenced to time served, and that testimony directly contradicted the inmate's testimony at the actual plea hearing where he acknowledged that he was pleading guilty to aggravated assault. Riggs v. State, 912 So. 2d 162 (Miss. Ct. App. 2005).

To the extent that the inmate's trial counsel erroneously advised the inmate that he would be eligible for parole after 10 years, the advice was incorrect and the counsel's performance was deficient; thus, the inmate was entitled to an evidentiary hearing to determine if he would have pled differently had the correct advice about parole been given. Garner v. State, — So. 2d —, 2005 Miss. App. LEXIS 695 (Miss. Ct. App. Sept. 27, 2005), opinion withdrawn by, substituted opinion at, remanded by 928 So. 2d 911, 2006 Miss. App. LEXIS 119 (Miss. Ct. App. 2006).

Denial of an inmate's motion for post-conviction relief was affirmed as the inmate's claim that his guilty plea was not knowing and voluntary due to his counsel's alleged deficient performance was contradicted by the inmate's statements at the plea hearing that he understood the consequences of his plea and was satisfied with his counsel's performance. Gonzales v. State, 915 So. 2d 1108 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate provided nothing more than his own affidavit to establish that he was deprived of effective assistance of counsel and did not allege that had it not been for his counsel's alleged ineffectiveness that he would not have pled guilty. Covington v. State, 909 So. 2d 160 (Miss. Ct. App. 2005).

Defendant's motion for post-conviction relief was properly denied because defendant's claim of ineffective assistance of counsel concerning defendant's guilty pleas was without merit as the record showed that defendant expressed satisfaction with his guilty plea and his attorney's performance. Further, defendant stated at the plea hearing that he understood the sentencing recommendation to which he subsequently objected. Sykes v. State, 909 So. 2d 120 (Miss. Ct. App. 2005).

95. — Mental examination, assistance of counsel.

Defense counsel was not ineffective in withdrawing his request for a mental evaluation of defendant after he could find no independent information suggesting that defendant was ever found to be in need of psychiatric or psychological care and no indication that defendant would not be competent to stand trial or that he had been legally insane at the time of the offense. Counsel was not deficient because he was intimately familiar with defendant, his family, and his background and because he conducted his own investigation and, after consulting with defendant, withdrew his request for a mental evaluation as originally filed and asked that an evaluation be conducted for purposes of securing mitigating evidence for use during the penalty phase of defendant's capital murder trial. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

Denial of the inmate's motion for post-conviction relief was appropriate because his counsel was not ineffective; his counsel had filed for the inmate to undergo a mental examination and counsel further took the inmate's mental condition into consideration when asking for a lenient sentence. Hayes v. State, 935 So. 2d 1133 (Miss. Ct. App. 2006).

98. — Waiver, assistance of counsel.

Regardless of whether defendant made an official waiver of appellate counsel on the record, he clearly asked that his appellate counsel be withdrawn, knowing that the result of that decision was that he would have to hire counsel himself or proceed pro se. Quite simply, defendant could not request, on the one hand, that his appointed appellate counsel be terminated and claim, on the other hand, that he was denied his Sixth Amendment right to counsel. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

99. —Misinformation from counsel, assistance of counsel.

While defendant alleged that counsel advised him that he was eligible for parole, defendant was unable to meet the second prong of the test for ineffective assistance of counsel because defendant was unable to show how this deficiency prejudiced defendant's case when the defendant entered a guilty plea to the sale of cocaine. Prince v. State, 967 So. 2d 69 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 581 (Miss. 2007).

100. — Conflicts of interest, assistance of counsel.

Defendants were not denied the effective representation of counsel regarding their joint representation because nothing conclusively indicated that defendants had interests that were adverse to each other, or that counsel should have engaged in some course of conduct that would have been adverse to the interests of one or the other. Defendants merely suggested that some of the evidence indicated the possibility of a conflict between the two. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

By dismissing defendant's former attorney, after defendant gave him counterfeit documents concerning a stolen vehicle for which defendant was being charged, the trial court did not violate defendant's constitutional right to counsel because, as the attorney was going to be called as a witness in defendant's subsequent trial, the conflict of interest between defendant and his former attorney required his removal as counsel. There was no evidence that the conflict was manufactured in order to deprive defendant of his former counsel's services or that he suffered undue prejudice by proceeding with his new counsel. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

101. — Ineffective counsel generally, assistance of counsel.

In appellant's capital murder case, counsel was not ineffective for failing to adequately investigate and present the motion to transfer venue because counsel filed a motion to change venue and supported that motion with numerous affidavits and all known relevant press documentation. The trial court held a hearing and determined that a fair trial could be held in Union County. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Counsel was not ineffective in failing to inform petitioner of the charges against him because a review of the statements of the children contained in the presentence report and their testimony at the sentencing hearing revealed no inconsistency. The specifics of the crimes were spelled out in the petition seeking approval to enter a guilty plea, and therefore, any claim that petitioner did not know he was pleading guilty to "photographing a child in sexually explicit conduct" failed. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to investigate because petitioner failed to present any competent evidence to establish the last time he took pictures of the girls, the date of his heart surgery, or any facts that would lend credence to his claims of innocence. Additionally, the record contained none. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to request a competency hearing because a report filed by the Mississippi State Hospital stated that it was an expert's opinion that petitioner was not suffering from any major mental disorder at the time of the alleged offenses such that he would not have known the nature, quality, and wrongfulness of his alleged acts at those

times. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Counsel was not ineffective in failing to challenge the indictment because any error resulting from exclusion of the numerical marker of the specific statute charged was harmless. The indictment put petitioner on notice of the charges against him, and any reference to an incorrect sentence was mere surplusage. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge; defendant's counsel performed a thorough cross examination of the witnesses called by the State; and defendant showed no prejudice in having the trial judge preside over the case. Williams v. State, 971 So. 2d 581 (Miss. 2007).

While the defendant stated that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated and that counsel was ineffective in failing to request a speedy trial, defendant however provided no information as to whether good cause was shown for the delay or whether the trial court granted any continuances; thus, he failed to present to any viable argument or any authority in support of his argument that his trial counsel was defective for failing to file a motion for a speedy trial, and therefore his counsel was not ineffective. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Defendant failed to support his allegations of ineffective assistance of counsel and mainly used the issue to reassert his innocence; therefore, the issue was without merit. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief pursuant to Miss. Code Ann. § 99-39-1 et seq. was appropriate because he failed to show that his attorneys were ineffective in part for requesting that venue be transferred; any prejudice claimed by the inmate was purely hypothetical and was insufficient to demonstrate any ineffectiveness. Turner v. State, 953 So. 2d 1063 (Miss. 2007).

Defendant's trial counsel was not ineffective where the indictment clearly informed defendant of the elements of the crime with which he was charged and there was nothing indicating that trial counsel's decision not to interview defense witnesses was not a valid legal strategy; defendant acknowledged that the trial judge advised him she could impose a minimum sentence of two years at his plea colloquy. Brown v. State, 944 So. 2d 103 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because he failed to prove that his counsel was ineffective. The inmate entered an open plea and admitted to the judge that he took full responsibility for the crime he committed; additionally, he was sentenced within the guidelines. Hoskins v. State, 934 So. 2d 326 (Miss. Ct. App. 2006).

Defendant did not show ineffective assistance of counsel where defendant failed to point out anything counsel could have done other than proceed to trial on a theory that a witness may have committed the crimes because he turned in some of the items taken in the robbery; indigent defendants were not entitled to appointed counsel of their choice. Anderson v. State, 943 So. 2d 102 (Miss. Ct. App. 2006).

Dismissal of the inmate's motion for post-conviction relief without a hearing was appropriate because nothing indicated that his counsel was deficient in any way; in fact, the record contained numerous motions filed by counsel in an effort to aid the inmate's defense, and his trial counsel also negotiated to get the original charge of capital murder reduced to murder. Moss v. State, 940 So. 2d 949 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because his counsel were not ineffective; after appointment, counsel began their defense with a vigorous volley of motions and his attorneys were able to secure a plea bar-

gain that relieved the him of a possible death sentence. Harris v. State, 944 So. 2d 900 (Miss. Ct. App. 2006).

In a capital murder case, an inmate's ineffective assistance of counsel claims were either procedurally barred, or, even if not procedurally barred, were without merit, under the following circumstances: (1) the inmate's counsel did not fail to adequately develop evidence to impeach a witness because counsel conducted a thorough cross-examination of the witness, and pursued a line of questioning attempting to call into doubt whether the witness could really have overheard a conversation in which the inmate stated that he sold the guns on the street; (2) counsel's representation of another witness in a prior action that was completely unrelated to the inmate's case was not a conflict of interest, and counsel conducted a full cross-examination of the witness; (3) counsel produced several witnesses placing the inmate at a nightclub on the night of the murders; (4) counsel did present a case in mitigation for the jury to consider; (5) counsel's closing argument was coherent and not a poor strategic choice; and (6) the prosecutor's arguments using scriptural, religious, or biblical references were proper because the prosecutor was responding to scriptural or religious arguments made by defense counsel. Manning v. State, 929 So. 2d 885 (Miss. 2006).

Court rejected defendant's claim that he received ineffective assistance of counsel in violation of the Sixth Amendment because defendant's counsel did file a motion to exclude evidence admitted as the result of an allegedly illegal search, and a suppression hearing was held as a result of that motion; therefore, defendant failed to meet the two-prong Strickland test that required defendant to show that his counsel's performance was deficient and that he was prejudiced by the deficiency. Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

Inmate failed to establish that he was deprived of effective assistance of counsel due to his counsel's failure to pursue an insanity defense, to have him evaluated or to obtain his records from the United States Army showing he was discharged for reasons related to his mental health, as he did not offer evidence in support of his claims, other than unsubstantiated allegations, sufficient to overcome the strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where his counsel was not ineffective, in part because it was determined that the inmate failed to demonstrate prejudice regarding the State's scriptural references or parole argument closing argument of the sentencing phase of his trial. Thus, his counsel was not deficient for failing to object. Manning v. State, — So. 2d —, 2005 Miss. LEXIS 464 (Miss. Aug. 4, 2005), opinion withdrawn by, substituted opinion at 929 So. 2d 885, 2006 Miss. LEXIS 109 (Miss. 2006).

102. — Tests of ineffectiveness of counsel, assistance of counsel.

Nothing in the record affirmatively showed constitutional ineffectiveness and defendant failed to show prejudice; thus, defendant failed to meet his Strickland burden. Givens v. State, 967 So. 2d 1 (Miss. 2007).

Since the indictment was not defective, counsel's decision not to challenge it could not amount to ineffective assistance of counsel, as challenging it would not have changed the result of the proceeding; defendant failed to present any evidence that would prove ineffective assistance of counsel. Mosley v. State, 941 So. 2d 877 (Miss. Ct. App. 2006).

Defendant failed to meet the burden required by Strickland where the circuit court judge found defendant's counsel's testimony regarding his representation of defendant to be more credible than defendant's testimony. Hubanks v. State, 952 So. 2d 254 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 171 (Miss. 2007).

Appellate court rejected an inmate's claims of ineffective assistance of counsel

because the inmate made only conclusory allegations, and all of evidence indicated that the inmate's counsel acted capably. Berry v. State, 924 So. 2d 624 (Miss. Ct. App. 2006).

Although the counsel who represented the inmate had previously prosecuted him on similar charges, the inmate failed to establish that he was deprived of effective assistance of counsel because the inmate did not prove prejudice. Dobbs v. State, 932 So. 2d 878 (Miss. Ct. App. 2006).

Inmate was not able to establish that his attorney rendered ineffective assistance of counsel prior to entering a guilty plea as his attorney was successful in getting other felony charges dismissed, and the inmate stated at the plea hearing that he was satisfied with his attorney's representation. Majors v. State, 946 So. 2d 369 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 50 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper; his counsel was not ineffective because the inmate's argument that his attorney was not convincing enough since the judge ruled against him did not show deficient performance under Strickland. The inmate had credited his counsel with making the correct arguments before the judge. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Although petitioner claimed that she was denied her right to effective assistance of counsel under the Sixth Amendment and Miss. Const. Art. 3, § 26, due to her counsel's failure to actively pursue a change of venue, generally conduct an investigation of her case, conduct an adequate investigation in preparation for the guilt-innocence phase and the sentencing phase of her trial, and to object and preserve for appeal purposes the prosecutor's improper comments during the guilt phase of the trial, the court had determined each of petitioner's arguments was without merit because, in her efforts to meet the Strickland test criteria, petitioner failed to demonstrate that her trial counsel's actions were deficient and that the deficiency prejudiced the defense of her case. Unless petitioner made both showings, it could not be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

Appellate court affirmed defendant's conviction for the sale of a controlled substance and marijuana because even if defendant's counsel's performance was deficient, defendant was not prejudiced by it given that the drug transaction was videotaped and shown to the jury and the confidential informant testified against defendant. Westbrook v. State, 928 So. 2d 186 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 243 (Miss. 2006).

103. —Time at which issue of ineffective counsel raised, assistance of counsel.

Issues of an involuntary guilty plea, ineffective assistance of counsel, a defective and improper indictment, and misconduct on the part of the state officials that were presented by an inmate in a motion for post-conviction relief, were procedurally barred because the inmate waited more than six years after the inmate was convicted to file the motion; furthermore, the trial court found that none of the exceptions to the three-year statute of limitations of Miss. Code Ann. § 99-39-5(2) were applicable, and thus the inmate was not entitled to post-conviction relief. Davis v. State, 958 So. 2d 252 (Miss. Ct. App. 2007).

104. —Manner of raising issue of ineffectiveness of counsel, assistance of counsel.

Defendant's ineffective assistance of counsel argument was rebutted by a lack of evidence, as well his own statements, and a prisoner's ineffective assistance of counsel claim was without merit when the only proof offered of the claim was the prisoner's own affidavit. Starks v. State, 992 So. 2d 1245 (Miss. Ct. App. 2008).

Defendant's request for post-conviction relief was denied as the circuit court did not err in holding that defendant adequately waived his right to conflict-free counsel and, under the Sixth Amendment,

defendant did not show that, but for his attorney's performance, the trial would have ended in a different result as counsel's conduct was not ineffective. Dupuis v. State, 972 So. 2d 7 (Miss. Ct. App. 2007).

105. — Trial strategy rather than ineffectiveness of counsel, assistance of counsel.

Nothing in the record rebutted the presumption that defendant's attorney's decision not to call witnesses was sound trial strategy, and defendant presented no evidence that the victim impact statement was inaccurate; defendant presented no evidence that there was any agreement that the State would not argue for the maximum sentence, and defendant received the agreed recommendation. Martin v. State, 20 So. 3d 734 (Miss. Ct. App. 2009), writ of certiorari dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 21 (Miss. 2010).

Trial court properly denied defendant's motion for postconviction relief after defendant was convicted of child molestation because it was not evident that, but for counsel's decision to abstain from using defendant's sister or her husband as witnesses, the outcome of the trial would have been different or that counsel's decisions stemmed from anything other than strategy. Didon v. State, 7 So. 3d 978 (Miss. Ct. App. 2009).

In a case involving the sale of cocaine, defendant did not receive ineffective assistance of counsel because it was not ruled out that a cross-examination regarding an informant's previous trips to defendant's house and a stipulation to the conviction of a third party who also sold drugs to the informant were just sound trial strategy. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

Defendant did not demonstrate that trial counsel was ineffective where he did not demonstrate how he was prejudiced by his attorney's failure to object to a witness's testimony, and defendant's crime had not been publicized to a point where a change of venue was needed; trial counsel was not ineffective in not calling a witness to testify on defendant's behalf as there was nothing in the statement that defendant claimed would show another shooter. Lamar v. State, 983 So. 2d 364 (Miss. Ct. App. 2008).

Appellate court presumed that counsel's actions were strategic and therefore within the realm of effective assistance when he elicited harmful testimony from a drug-testing expert during a prisoner's probation revocation hearing; on cross-examination, counsel asked the expert how long marijuana remains in a person's system. In so doing, counsel could have been trying to demonstrate that, given the prisoner's body weight and fat content, marijuana would have remained in his system longer than it would have remained in another person's system; given the presumptions involved, it appeared that counsel was making the only argument possible under the circumstances. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because his counsel was not ineffective; defendant's prior convictions surfaced as a product of his impeachment regarding his assertions of an ongoing, consensual sexual relationship with the victim, and counsel's decision whether to request a limiting instruction regarding a part of the evidence against defendant might have been part of the trial strategy. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Defense counsel was not ineffective for failing to cross-examine two witnesses concerning DNA evidence as defendant's right to confrontation was not violated by trial counsel's failure to cross-examine those witnesses because the reports they testified about were actually prepared by them, contrary to defendant's arguments; thus, defense counsel's decision not to cross-examine those two witnesses, as well as the other witnesses he chose not to cross-examine, was a tactical decision and could not be said to be unreasonable. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Trial counsel was not ineffective because he filed a motion in limine to exclude the alleged prior bad acts from the

jury, and counsel's decision not to seek an instruction stating that the testimony regarding the charges was to be considered solely to establish defendant's motive for murdering the victim was a strategic one. Jones v. State, 962 So. 2d 1263 (Miss. 2007).

Defendant failed to satisfy the deficiency prong of the Strickland analysis where the shirt and gun were relevant evidence because he wore the shirt and had the gun that night and both were similar to the limited descriptions the victims gave; trial counsel's failure to object in the case was reasonable trial strategy as trial counsel set out to impeach the identifications. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Defendant failed to show that he received ineffective assistance of counsel when trial counsel did not move for a change of venue in a capital case because the record did not support the allegation regarding pre-trial publicity, and there was no right to change venue to a jurisdiction with certain racial demographics. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a murder case, defendant failed to show that he received ineffective assistance of counsel based on a failure to object to certain statements regarding the copying of keys and the failure to call the victim's former girlfriend; defendant failed to show that the statements were relevant, and the choice not to call a witness was merely trial strategy. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

Defendant alleged that his counsel was ineffective because his counsel developed a trial strategy and then did not investigate, secure expert assistance, offer any evidence in support of the theory, or request a jury instruction in support of the theory; however, his ineffective assistance of counsel claim failed because (1) counsel attacked the weakness of the State's case by adducing testimony on cross-examination that a sexual assault kit from the victim testing for any of defendant's DNA in her came back negative; (2) counsel did make a request for a pathologist at state expense for assistance in interpreting the autopsy report, but the trial court exercised its discretion in refusing defense counsel's request for an independent evaluation, and the trial court's actions in denying defendant an expert did not deny him a fair trial; and (3) counsel's decision not to submit lesser offense jury instructions, while it turned out to be unsuccessful (if successful, then defendant would not have been guilty of any offense and a free man), was appropriate trial strategy, and, thus, beyond the realm of serious consideration on a claim of ineffective assistance of counsel. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Defendant alleged that he was denied his constitutional right to effective assistance of counsel, but the aid given by defendant's trial counsel was effective and presented no basis for reversal on appeal because (1) the testimony at trial clearly indicated that the victim's body had been moved and that any knife which might have been at the crime scene was not found until later; (2) during cross-examination, defendant's counsel strongly questioned law enforcement as to how thorough their search and investigation of the scene was; (3) defendant failed utterly to demonstrate that character witnesses would have changed the outcome in his case, and he presented no evidence indicating that the failure to call character witnesses prejudiced his defense; (4) counsel's decision, not to ask that the jury be allowed to view the crime scene, fell within the ambit of reasonable trial strategy; (5) the decision of trial counsel to not discuss any violent incidents of the victim could very well have been predicated upon the fact that any violent propensities of defendant could then be brought out by the State; and (6) it was unclear from defendant's argument what other evidence he would have had his counsel present regarding his self-defense claim. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

Defendant's counsel did not provide ineffective assistance where, although the

actions of defendant's counsel were not error-free, the error of untimely witness disclosure was not so egregious as to undermine the confidence in the outcome; the disallowed alibi testimony was very weak, unpersuasive given the strength of the opposing evidence, and even contradictory; the evidence against defendant was very persuasive. Ransom v. State, 919 So. 2d 887 (Miss. 2005), writ of certiorari denied by 548 U.S. 908, 126 S. Ct. 2931, 165 L. Ed. 2d 958, 2006 U.S. LEXIS 4985, 74 U.S.L.W. 3721 (2006).

106. — Failure or refusal to present evidence as ineffectiveness of counsel, assistance of counsel.

In appellant's capital murder case, counsel was not ineffective for failing to obtain the State's witness's criminal history because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, the witness was examined thoroughly and extensively about his identification of appellant and about the lighting and other visibility factors. Howell v. State, 989 So. 2d 372 (Miss. 2008).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

In defendant's trial for capital murder, defendant alleged that her trial counsel was ineffective, but defendant's allegations, which were unsupported by evidence, were insufficient to rebut the presumption that counsel's performance was reasonable; defendant claimed that witnesses were available to testify about the deceased child's mother's treatment of the child, but defendant did not provide any supporting affidavits from these witnesses. Berry v. State, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Petitioner was entitled to a post-conviction hearing on the issue of ineffective assistance of counsel as counsel's untimely disclosure of some mitigation witnesses led to their exclusion from the sentencing phase of a capital murder trial, which the trial court even characterized as ineffective assistance of counsel; in addition, counsel failed to pursue petitioner's mental retardation claim and to offer sufficient mitigating evidence. Lynch v. State, 951 So. 2d 549 (Miss. 2007).

Defendant's murder conviction was appropriate where his counsel was not ineffective. Defendant listed approximately 40 instances of leading questions asked by the State of the victim's brother, a child, but defendant failed to state how those leading questions in any way prejudiced defendant. Osborne v. State, 942 So. 2d 193 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

Defendant raised an ineffective assistance of counsel claim where there was evidence of conflicting statements by the victim as to who poured boiling water on him and was enough to raise a reasonable doubt that defendant committed the offense; if defense counsel had investigated and presented evidence of defendant's prior abuse by the victim, and of the abuse that defendant testified had taken place immediately prior to the incident, the inconsistencies in testimony of the victim's mother and sister concerning those events, and the intervening circumstances of the victim's death from respiratory failure, it was reasonable to conclude that the outcome of a jury trial may have been different. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

107. — Inadequate preparation for trial as ineffectiveness of counsel, assistance of counsel.

Defendant's claim that counsel was ineffective for not interviewing defendant until the day before the trial was without merit; counsel was able to procure a sen-

tencing deal where defendant would not be sentenced as a habitual offender and arranged for the dismissal of another charge with a potential 60-year sentence. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Record did not affirmatively show ineffective assistance of counsel of constitutional dimensions where a very thorough motion for pre-trial discovery was in fact made, and defendant failed to identify any witnesses who should have been interviewed or whose testimony would have strengthened his defense; defendant identified no aspect of his attorney's performance that suggested a failure to investigate the circumstances and law surrounding his case, and the sentence defendant received was in accord with the applicable statutes. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Defendant's conviction for burglary of a business was appropriate in part because the record was insufficient to resolve defendant's claim that his attorney was ineffective for not reviewing a surveillance video prior to cross-examining any of the prosecution's first three witnesses; the record's state rendered it impossible for the appellate court to examine defendant's allegations. Turner v. State, 962 So. 2d 691 (Miss. Ct. App. 2007), writ of certiorari dismissed by 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

Defendant's motion for post-conviction relief was properly denied where he failed to provide sufficient evidence demonstrating his attorney's deficiency; defendant admitted in his brief that he could not name the witness that counsel should have interviewed, nor did he disclose the "mitigating information" that counsel allegedly failed to uncover. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant's request for post-conviction relief was denied on the basis of ineffective assistance of counsel due to an alleged failure to investigate in general because that issue was procedurally barred; however, there was no ineffectiveness based on an alleged failure to investigate during the guilt phase of a capital murder trial since counsel would not have been able to determine that testimony would have been perjury, defendant did not have an alibi defense, and decisions regarding the examination of an expert were trial strategy where there was no showing that the expert was not qualified. Even though the failure to call a bite mark expert was ineffective, no prejudice was shown since there was no showing that defendant did not bite the victim. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Federal district court correctly denied state death row inmate's habeas corpus petition because defense counsel was not ineffective for failing to adequately interview the government's pathologist prior to cross-examining him; although the Mississippi Supreme Court erroneously indicated that counsel had interviewed the witness for only 15 minutes, the record clearly showed that counsel had talked to him the evening before cross-examination as well as for 15 minutes prior to that and had affirmatively indicated to the trial court the next morning that he felt he had had sufficient preparation time. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

Petition for post-conviction relief was denied without an evidentiary hearing where a plea was entered to armed robbery because, despite counsel's failure to investigate the type of weapon actually used, no prejudice resulted since an inmate failed to show that he would have proceeded to trial. Hinton v. State, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

In an aggravated assault case, the court erred in finding that counsel was effective where counsel's failure to investigate the case prejudiced defendant; the testimony of the alibi witnesses, coupled with the fact that there was absolutely no physical evidence to convict defendant, could very well have changed the outcome of the trial. Johns v. State, 926 So. 2d 188 (Miss. 2006).

107.5. — Failure to file motion for severance as ineffective assistance of counsel, assistance of counsel.

Defendant's trial counsel was not ineffective because: (1) he filed a pre-trial motion to sever the two counts of rape and argued at the hearing that trying two counts together would be highly prejudicial to his client; (2) counsel conducted voir dire, which included instructing the jury as to the state's burden of proof; (3) he objected to one of the state's for-cause strikes, arguing that the potential juror said he could be fair and impartial despite the fact he had known defendant his entire life, with which the trial court agreed; (4) defense counsel cross-examined four of the state's eight witnesses and seemingly made an effort to get some witnesses to contradict their prior testimony; (5) the defense chose not to call any witnesses; (6) defendant was thoroughly advised of his right to testify and he told the trial judge he did not want to testify; and (7) in closing, defense counsel did not rehash the damaging testimony against his client, but merely reminded the jury of the state's heavy burden of proof and defendant's presumption of innocence; given the strength of the state's case against defendant, trial counsel provided reasonable, if not perfect, representation to his client. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

108. — Jury selection as instance of ineffective assistance of counsel, assistance of counsel.

Trial court properly denied defendant's motion for post-conviction relief where defendant was not entitled to a jury of any particular racial composition; therefore, defendant could not show that counsel was deficient in failing to object to an all-white jury. It was impossible to prove that counsel's objection to the jury composition would have created a different result if no original verdict was reached. Shumpert v. State, 983 So. 2d 1074 (Miss. Ct. App. 2008).

Defendant's conviction for aggravated assault was appropriate because his counsel was not ineffective under the Sixth Amendment; his counsel actively participated in exercising peremptory challenges and striking jurors for cause, and further, the supreme court held that the defense was not prejudiced by a witness's failure to appear. Harrell v. State, 947 So. 2d 309 (Miss. 2007).

Defendant's counsel was not ineffective because a trial judge asked if any potential juror would automatically vote for or against the death penalty, and the trial judge requested that the attorneys not be redundant in their voir dire examination, keeping in mind the voir dire the court had conducted; honoring that request, defense counsel's failure to pursue that line of questioning during voir dire did not constitute deficient performance that prejudiced the defense. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

109. — Failure to object to indictment as ineffectiveness of counsel, assistance of counsel.

Where indictments charging defendant with the sale of cocaine were not defective, there was no reason for defense counsel to object; hence, counsel was not ineffective. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Defendant's ineffective assistance claims against a court-appointed attorney failed where he failed to show how his defense was adversely affected by an indictment amendment that changed the date of the alleged burglaries. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Defense counsel was not ineffective for failing to object to defendant's indictment because the indictment was not fatally defective and during the plea colloquy defendant stated under oath that he was satisfied with counsel's performance and felt that it was effective. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

Claims that defendant argued to be defects in the indictment were insufficient to show deficiency in his counsel's performance or prejudice to his case. Westbrook v. State, 953 So. 2d 286 (Miss. Ct. App. 2007), writ of certiorari dismissed by 962

So. 2d 38, 2007 Miss. LEXIS 436 (Miss. 2007).

110. — Failure to object to evidence as ineffectiveness of counsel, assistance of counsel.

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

In an armed robbery case, counsel was not ineffective for failing to request a circumstantial-evidence instruction because defendant was pulled over thirty minutes after the robbery, and he was wearing a tan shirt and distinctive white tennis shoes similar to the clothing described by the employees as being worn by the robber. Furthermore, defendant had brown cotton gloves, a blue ski mask, a black duffel bag with rolled coins, various amounts of bills, and store receipts. Johnson v. State, 999 So. 2d 360 (Miss. 2008).

Appellate court rejected a prisoner's claim that counsel provided ineffective assistance by failing to call an expert witness to testify at his probation revocation hearing about the levels of marijuana in the prisoner's system because the prisoner did not show he was prejudiced by counsel's alleged failure. Specifically, the prisoner was unable to demonstrate that the outcome of his probation revocation hearing would have been different, since the circuit court could have found, more likely than not, that the prisoner violated the terms of his probation by continuing to smoke marijuana. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

Defendant who was found guilty of attempted manufacture of methamphetamine under Miss. Code Ann. § 41-29-313(1)(c) did not show ineffective assistance of counsel because counsel was not deficient in failing to object to a narcotics agent's testimony that he had received complaints concerning defendant's possible manufacture of methamphetamine, or to the agent's description of the predominant method of manufacturing methamphetamine in the area. Myhand v. State, 981 So. 2d 988 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defense counsel was not ineffective for failing to object to defendant's statements that he made to law enforcement being entered into evidence where defendant's statements consisted of his version of an alleged sexual battery incident as well as two prior interactions with the victim; the statements supported defendant's theory of the case, namely that he was looking for a dog on the bed and touched the seven-year-old victim accidentally. McClure v. State, 941 So. 2d 896 (Miss. Ct. App. 2006).

111. — Failure to call witnesses as ineffectiveness of counsel, assistance of counsel.

Counsel was not ineffective for allegedly failing to properly consult with a DNA expert, failing to consult a serologist, and failing to adequately investigate DNA testing because a review of the cross-examination of the witness from the facility that performed the DNA testing for the state by defense counsel easily allowed one to draw the conclusion that a defense expert assisted counsel in preparation for cross-examination, and the inmate could

not show that counsel was deficient. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

In a death penalty case, counsel was not ineffective for failing to obtain expert testimony to show that the victim's body position was "staged" because it was doubtful that expert testimony regarding the positioning of the body would have likely resulted in a different verdict; the victim was found nude from the waist down with her shorts and underwear bunched at one ankle, as well as with five gunshot wounds to her head. Powers v. State, 945 So. 2d 386 (Miss. 2006), writ of certiorari denied by 551 U.S. 1149, 127 S. Ct. 3006, 168 L. Ed. 2d 733, 2007 U.S. LEXIS 8389, 75 U.S.L.W. 3695 (2007).

Counsel was not ineffective for failing to present evidence in mitigation of the death penalty because an expert testified about the petitioner's mental retardation, the petitioner's mother was also questioned regarding the petitioner's mental retardation, and therefore counsel placed the issue of the petitioner's mental retardation before the jury for purposes of mitigation. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Counsel was not ineffective for failing to call an expert as a witness because there was no indication that the outcome of defendant's murder trial would have been different; the expert, a psychologist, discussed at length that defendant had a clear understanding of the trial process and knew the difference between right and wrong. Brown v. State, 936 So. 2d 447 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel during his trial for breaking and entering; counsel was not deficient in failing to subpoena two of the State's witnesses who did not even testify at trial against defendant. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Where defendant's counsel clearly presented the defendant's version of events, and a pretrial statement made by defendant to police, which was entered into evidence, allowed the jury to hear his version of the events despite his decision not to testify in his own defense, and defendant did not state what witnesses should have been called, or what additional evidence his counsel could have presented at trial, when viewed in the totality of the circumstances, the actions of defendant's counsel constituted reasonable trial strategy, and defendant did not meet his burden on appeal of showing how his counsel's decision not to call witnesses at trial was deficient performance. Townsend v. State, 933 So. 2d 986 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

112. —Failure to object to argument of state as ineffectiveness of counsel, assistance of counsel.

Post-conviction relief was denied because defendant did not receive ineffective assistance of counsel based on a failure to object to a prosecutor's closing argument since references to defendant's possible escape from prison did not compromise his right to a fair trial; moreover, the prosecutor did not "ramble on and on" about his personal experiences. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant failed to show that his trial counsel was ineffective because (1) a circumstantial evidence instruction would not have been proper under the facts of the case, and the failure of trial counsel to request such an instruction was not error; (2) the failure of counsel to object to the prior statement of an alleged accomplice as hearsay was not error because the trial court properly allowed the former statement of the accomplice to be used for impeachment, and any objection to hearsay by trial counsel would not have resulted in any change in the outcome; and (3) trial counsel did not err in not requesting a lesser-included offense instruction of receiving stolen property because his theory and defense were that the State did not prove its case, and an all or nothing — guilty or acquittal — trial strategy was proper. Long v. State, 934 So. 2d 313 (Miss. Ct. App. 2006), writ of certiorari dismissed by 939 So. 2d 805, 2006 Miss. LEXIS 610 (Miss. 2006).

113. — Failure to object to or request instructions as ineffectiveness of counsel, assistance of counsel.

Defense counsel was not ineffective for not objecting to a jury instruction, which contained language that differed from the language of the indictment, because the instruction did not accuse defendant of any other separate or distinct crime other than that of the indictment, nor did it refer to facts of which defendant had no notice; the variance was not material. Nix v. State, 8 So. 3d 141 (Miss. 2009).

Defendant's claim of ineffective counsel in a murder trial failed because the jury instructions were proper and requesting a jury instruction on manslaughter that was commonly given on the prosecution's request was permissible trial strategy to try to ensure that the jury knew they were not required to find murder, and that a lesser offense was available when there was strong evidence that defendant shot the victim. Mullen v. State, 986 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 559 (Miss. 2008).

Defendant who was found guilty of attempted manufacture of methamphetamine under Miss. Code Ann. § 41-29-313(1)(c) did not show ineffective assistance of counsel because counsel was not deficient in failing to request a jury instruction as to possession of precursor chemicals because the punishment for that crime was exactly the same as the one for attempted manufacture of methamphetamine. Myhand v. State, 981 So. 2d 988 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

Defendant failed to present a prima facie demonstration of ineffective assistance of counsel where there was no indication that the jury would return a verdict of "not guilty" had the jury instruction contained the cumulative language defendant suggested; the jury understood that it was to remain suspicious of the witness's testimony and to weigh it with care. Dear v. State, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

114. —Sentencing phase procedures as indicative of ineffectiveness of counsel, assistance of counsel.

Defense counsel was not ineffective for failing to object to defendant's sentence because the sentence was within the statutory maximum for the offense in question, and during the plea colloquy defendant stated under oath that he was satisfied with counsel's performance and felt that it was effective. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to present mitigating evidence at sentencing because it was the inmate's choice not to do so; the inmate was fully apprised of the consequences of his choice and he made an informed and voluntary decision not to present mitigating evidence. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Defendant did not receive ineffective assistance of counsel by the failure to challenged an aggravating circumstance not named in an indictment in a capital murder case because he was not entitled to formal notice of such since an indictment for capital murder put defendant on sufficient notice that the statutory aggravating factor would have been used against him. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief in a capital murder case based on the argument that the use of the "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was inappropriate was denied because it was procedurally barred; however, even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief was denied because defendant's assertion that he received ineffective assistance of counsel during the sentencing phase of a capital murder trial was procedurally barred; however, even if it was not, ineffectiveness was not shown because, despite mitigation evidence that defendant was a great person and had not been violent, the state could have presented evidence of his prior convictions. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month old victim, the record revealed that defendant's trial counsel procured testimony from his mother that his father deserted him at a young age and did not play a role in rearing him, and his grandmother testified to her relationship with defendant as a boy and discussed his love for children and that he had planned to marry the victim's mother to care for both of them. Given the testimony provided in mitigation and what it did show the jury about defendant's life and tendencies, counsel did not fail to investigate potential mitigating evidence for purposes of punishment and his performance was not prejudicially deficient. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

In a case where defendant was found guilty of capital murder — murder during the commission of sexual battery on a six-month old victim, while counsel's closing arguments at the sentencing phase of defendant's trial, when viewed with the benefit of hindsight, could have been presented more forcibly, closing argument fell under the ambit of defense counsel's trial strategy. Given the wide latitude and any strategic decisions counsel could have made with regard to his approach to the trial of the case, defendant's counsel was not ineffective. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Inmate was not deprived of effective assistance of counsel at his plea and sentencing hearing simply because his counsel failed to object to the presence of the victim's family, because they had a right to be present and speak at the hearings. Johnson v. State, 908 So. 2d 900 (Miss. Ct. App. 2005).

116. — Totality of circumstances demonstrating ineffectiveness of counsel, assistance of counsel.

Counsel was not ineffective for failing to investigate the police informant because, had defendant not pleaded guilty and gone to trial, the informant's background would have been relevant only for impeachment purposes, and in his petition to enter a guilty plea, defendant swore that his attorney had counseled him and advised him about the nature of the charge and all possible defenses. Deloach v. State, 937 So. 2d 1010 (Miss. Ct. App. 2006).

Federal district court correctly denied state death row inmate's habeas corpus petition; defense counsel was not ineffective for failing to introduce petitioner's medical records, documenting his history of automobile and hunting accidents as well as a drug overdose, in mitigation at a resentencing hearing because petitioner's family members testified about his dysfunctional and abusive family background, and having the additional medical evidence would not have dissuaded the jury from returning a death sentence. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

117. — Different outcome likely as proof of ineffectiveness of counsel, assistance of counsel.

Defendant's convictions for two counts of capital murder were upheld because while defendant was able to give several examples of what defendant perceived to be counsel's deficiencies, including counsel's failure to fully investigate through discovery motions what information the State had related to the case, defendant was not able to satisfy the second prong of the Strickland test; defendant failed to establish a reasonable probability that but for counsel's error he would have had a better result. Dahl v. State, 989 So. 2d 910 (Miss. Ct. App. 2007), writ of certio-

rari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

Counsel was not ineffective for allegedly failing to investigate the physical evidence to find inconsistencies with the inmate's confession because the record was full of independent evidence that was consistent with and supported the inmate's confession to the kidnapping and murder; therefore, the inmate could not show that his trial would have been different. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Dismissal of the inmate's motion for post-conviction relief was proper in part because he failed to prove that his counsel was ineffective; the inmate failed to demonstrate how the outcome of his case would have been different had his attorney performed the acts that the inmate alleged that the attorney was deficient in failing to perform. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Petitioner failed to demonstrate that his counsel was ineffective for failing to investigate the background of a police informant where petitioner did not argue that he would not have pled guilty but for the ineffective assistance of his counsel, or that he was prejudiced by his attorney's alleged failure. Elliott v. State, 939 So. 2d 824 (Miss. Ct. App. 2006).

Defendant's conviction for capital murder was appropriate because he failed to prove that his counsel was ineffective; the appellate court failed to see how examining additional photographs would have enabled defendant's counsel to more effectively cross-examine the state's experts to the extent that the trial outcome would have changed. Williams v. State, 937 So. 2d 35 (Miss. Ct. App. 2006).

In an ineffective assistance of counsel claim, defendant pointed to his trial counsel's failure to object to leading questions, failure to object to jury instructions containing assumptions of fact, failure to effectively cross-examine, failure to adequately investigate his case, failure to call witnesses, and numerous other grounds; however, defendant's trial counsel was not ineffective based on the record. Any errors defendant's trial counsel might have committed in the case were not prejudicial to the defense so as to create a reasonable probability of a different outcome in the absence of such errors; thus, defendant's ineffective assistance of counsel claim failed. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

119. — Burden of proof of ineffectiveness of counsel, assistance of counsel.

Denial of defendant's motion for post-conviction relief was proper because he failed to meet his burden of proof under Miss. Code Ann. § 99-39-23(7) in that he failed to show that his guilty plea was not knowing and voluntary and that his counsel was ineffective; the trial court had responsibility to assess defendant's credibility and found no deficiency. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Denial of the inmate's motion for post-conviction relief was proper because, notwithstanding the admissions and concessions contained within the inmate's petition and throughout his hearing, he further failed to offer any affidavits or additional proof in support of his claim of ineffective assistance of counsel other than his own beliefs. Ross v. State, 936 So. 2d 983 (Miss. Ct. App. 2006).

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

120. — Sufficiency of evidence of ineffectiveness of counsel, assistance of counsel.

Defendant claimed that he received ineffective assistance of counsel because his

trial counsel failed to make timely disclosure of two witnesses, which resulted in exclusion of the testimony of the witnesses, but there was nothing to suggest a constitutionally deficient performance. Defendant also contended that defense counsel should have objected to a lesser-included jury instruction, but this could have been counsel's trial strategy; finally, counsel was not deficient for failing to use a peremptory strike against a juror. McGregory v. State, 979 So. 2d 12 (Miss. Ct. App. 2008).

Defendant's retained counsel was not ineffective in informing the jury that defendant was a habitual offender where that information was included in the indictment. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Trial court did not err in failing to sua sponte declare a mistrial for ineffective assistance of counsel where defendant failed to show a reasonable probability that he would have received a different result given his taped confession, his presence in the church office on the day of the burglary, and his signature on two checks found in the office. Deloach v. State, 977 So. 2d 400 (Miss. Ct. App. 2008).

Defendant's conviction for armed robbery was proper because he failed to prove that his counsel was ineffective; in part, counsel's failure to object to the introduction of evidence, which was clothing, was not ineffective because the evidence against defendant was overwhelming. Hancock v. State, 964 So. 2d 1167 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 526 (Miss. 2007).

Where a defendant raised ineffective assistance of counsel on direct appeal, and raises it again in a post-conviction proceeding, supported by extraneous materials that were not available on direct appeal, an appellate court's consideration of the issue is not barred by res judicata; where the defendant raises ineffective assistance of counsel at the post-conviction stage, and it is the same issue raised on direct appeal but only rephrased, res judicata will apply. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Defendant was not entitled to post-conviction relief based on ineffective assistance when res judicata barred some of the claims such as counsel's failure to support a motion to suppress defendant's confession, counsel's failure to properly advise on plea bargains, counsel's failure to introduce victims' impact statement, and failure to properly prepare defendant to give his testimony; and defendant's remaining claims lacked merit. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

121. — Post-conviction proceedings, assistance of counsel.

Defendant's convictions for murder and aggravated assault were proper where he failed to show that his counsel was ineffective on direct appeal. The court did not find the record to affirmatively show ineffectiveness of constitutional dimensions, nor did the court find any stipulation by the parties regarding the adequacy of the record. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

121.5 — Failure to file motion for reconsideration as ineffective assistance of counsel, assistance of counsel.

Appellate court rejected a prisoner's claim that counsel provide ineffective assistance by failing to file a timely motion for reconsideration; the record did not contain a motion for reconsideration or an order finding that such a motion was untimely. In any event, assuming counsel had filed a timely motion for reconsideration, there was no reason to assume that there was a sufficient probability that the circuit court would have reversed itself. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

122. Change of venue.

Post-conviction relief was properly denied where trial counsel's failure to seek a change of venue because of pretrial publicity was not error, as most of the venire was largely unaware of the case, and

those who were unaware of it assured counsel and the trial court that they could be impartial. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

On the inmate's petition for post-conviction relief, the court held that defense counsel's decision not to seek a change of venue based on pretrial publicity was beyond its review. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Federal district court correctly denied state death row inmate's habeas corpus petition; the venue chosen for petitioner's resentencing hearing was proper, even though it was in the county in which the crimes occurred, and even though the trial venue had been changed to a different county due to excessive pretrial publicity, because years had passed since petitioner had been found guilty, and although two of selected resentencing jurors had some knowledge of the case, petitioner failed to prove that the resentencing jury was tainted. Holland v. Anderson, 439 F. Supp. 2d 644 (S.D. Miss. 2006).

125. Other particular homicides.

126. — Other particular circumstances.

Circuit court did not err in allowing defendant to represent himself because the circuit court abided by the law and the requirements of Miss. Unif. Cir. & Cty. R. 8.05; defendant made a knowing and intelligent waiver of his Sixth Amendment right to assistance of counsel, defendant knew that he had a right to counsel because counsel had been appointed to represent him, and defendant knew that his court-appointed counsel was representing him both before and after he elected to manage his own defense since he expressly agreed to counsel's continued assistance. Bradley v. State, 58 So. 3d 1166 (Miss. 2011).

On the inmate's petition for post-conviction relief, the court held that the inmate was not prejudiced by counsel's failure to transcribe the full record because the inmate did not claim any specific error arising from the non-transcribed sections of the record. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

RESEARCH REFERENCES

Law Reviews. Crawford v. Washington: Implications for the Presentation of Child-Witness Testimony in Child-Abuse Cases, 25 Miss. C. L. Rev. 97, Fall, 2005.

Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

AMENDMENT VII

CIVIL TRIALS

JUDICIAL DECISIONS

1. In general.

Chancellor erred by failing to transfer a dispute over contractual obligations to a circuit court because a former member did not bring most of the claims derivatively under Miss. Code Ann. § 79-4-7.40 since he was seeking a personal recovery, and the proper procedures were not followed; moreover, the parties would have been deprived of the right to a jury trial if transfer was not obtained. ERA Franchise Sys. v. Mathis, 931 So. 2d 1278 (Miss. 2006).

Amendment VIII

Excessive bail, fines, punishments

JUDICIAL DECISIONS

1.5. Constitutionality.

Defendant's enhanced sentence of 60 years, a two million dollar fine, and fifty dollars in restitution, pursuant to Miss. Code Ann. § 41-29-152, for possession of methamphetamine with intent to distribute and possession of a firearm while intending to distribute, was not disproportionate to the crime committed and did not amount to cruel and unusual punishment in violation of the Eighth Amendment because his sentence did not exceed the statutory limits. Even though defendant was a first time offender and possessed a small amount of methamphetamine, the trial judge had discretion under Miss. Code Ann. § 41-29-149 to reduce the statutory sentence for first time offenders; however, the trial court was not required to take into account the first time offender status when sentencing. Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 482 (Miss. 2006), writ of certiorari denied by 549 U.S. 1324, 127 S. Ct. 1914, 167 L. Ed. 2d 570, 2007 U.S. LEXIS 3842, 75 U.S.L.W. 3530 (2007).

7.5. Mental retardation.

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to determine if he was exempt from execution under the Eighth Amendment because of his mental retardation was properly denied and did not constitute a violation of his due process rights because defendant did not show a substantial need for an independent expert because: (1) based on his intelligence quotient tests, one doctor already determined that defendant was mentally retarded; and (2) a second doctor stated in her affidavit that she thought defendant was mentally retarded, and that further testing and a complete social history was necessary to accurately ascertain whether defendant was in fact mentally retarded. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Execution of mentally retarded inmates constituted cruel and unusual punishment in violation of the Eighth Amendment; the trial court did not err in finding that defendant was not mentally retarded because: (1) although two doctor's opined that defendant was mentally retarded based on his intelligence quotient tests, a second doctor testified that he found defendant to be below average intelligence but not mentally retarded; (2) a doctor who opined that defendant was mentally retarded was asked if a person who was mentally retarded could write documents that an officer stated that defendant wrote and he stated that it would be highly unlikely; (3) the officer saw defendant create the documents in his room without assistance, saw him use the law library on several occasions, and noticed that he had

legal books in his cell; and (4) a psychiatrist at the Mississippi department of corrections stated that her diagnostic impression was that mental retardation could be ruled out. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Petitioner was entitled to a postconviction hearing on whether he was mentally retarded, and therefore not competent to be executed based on the Eighth Amendment; petitioner's intelligence quotient fell within the mildly retarded range, and further testing was required. Lynch v. State, 951 So. 2d 549 (Miss. 2007).

10. Capital sentencing procedures — In general.

11. — Aggravating and mitigating circumstances, capital sentencing procedures.

With respect to a charge of capital murder committed during the course of a robbery, the use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

In a resentencing trial in a capital murder case, under the Eighth Amendment defendant was permitted to introduce mitigating evidence; however, he was not permitted to introduce evidence that he was not the victim's killer because that issue was procedurally barred from further consideration under the doctrine of res judicata. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court did not err in granting the state's in limine motion to prevent defendant's family from testifying to the impact a death sentence would have on the family; such evidence did not qualify as "relevant mitigating evidence" because it did not address defendant's character, record, or the circumstances of the offense. Ross v. State, 954 So. 2d 968 (Miss. 2007).

13. — Arguments of counsel, capital sentencing procedures.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

15. Cruel and unusual punishment — In general.

Defendant's life sentence for possession of cocaine and possession of marijuana was not cruel and unusual punishment because he met the requirements of the habitual offender statute under Miss. Code Ann. § 99-19-83 in that he was also convicted of two separate prior felonies, one of which was a violent crime, and he served more than a year for each. Furthermore, U.S. Const. Amend. VIII did not contain a proportionality guarantee. Jenkins v. State, 997 So. 2d 207 (Miss. Ct. App. 2008).

Defendant's sentence for 15 years after pleading guilty to manslaughter under Miss Code Ann. § 97-3-47 was not cruel and unusual punishment and did not violate U.S. Const. Amend. VIII because Miss. Code Ann. § 97-3-25 provided that the sentencing range was two to 20 years. Henderson v. State, 929 So. 2d 391 (Miss. Ct. App. 2006).

16. — Age of defendant, cruel and unusual punishment.

Because the record was clear that defendant was six days past his 18th birthday at the time of the capital murder, he was over the age of 18, and was therefore eligible for the death penalty. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Supreme Court of Mississippi vacated the death sentence imposed on a defendant convicted of capital murder. The death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution, because defendant was only 17 years old when he committed the crime. Dycus v. State, — So. 2d —, 2005 Miss. LEXIS 594 (Miss. Sept. 15, 2005).

18. — Sentences within statutory limit, cruel and unusual punishment.

In a sale of cocaine case, defendant's 60-year sentence was not excessive because it was well within the statutorily proscribed limits, the trial judge noted that defendant had sold cocaine to a buyer over 100 times, and the gas station at which defendant sold cocaine was within walking distance of a school. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Defendant's sentence as a habitual offender after he was convicted of the possession of cocaine and the possession of hydromorphone was constitutional because he was sentenced to 108 years under Miss. Code Ann. § 41-29-147, and that sentence was within the statutory limits. Roach v. State, 7 So. 3d 932 (Miss. Ct. App. 2007), reversed by 7 So. 3d 911, 2009 Miss. LEXIS 199 (Miss. 2009).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Defendant's sentence of 20 years in prison, with 10 years to be suspended and five years of post-release probation, for one count of burglary of an occupied dwelling was not grossly disproportionate where he had been involved in other domestic disturbances prior to the one in question; thus, the 20-year sentence was within the statutory guidelines. Edge v. State, 945 So. 2d 1004 (Miss. Ct. App. 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S. Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. Kelly v. State, 947 So. 2d 1002 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 89 (Miss. 2007).

Circuit court had the authority to impose a life sentence for defendant's conviction of capital rape because the legislature used words indicating judicial discretion would be the determination for crimes of statutory rape in Miss. Code Ann. § 97-3-65 (2)(c). Foley v. State, 914 So. 2d 677 (Miss. 2005).

Two consecutive 20-year sentences for defendant's convictions for manslaughter and aggravated assault where he shot and killed his wife's boyfriend and shot his wife in the neck did not constitute cruel and unusual punishment as the sentences imposed were within the statutory range for Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 97-3-7(2), and the trial judge articulated his reasoning for the sentences imposed. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

19. — Disproportionate sentence, cruel and unusual punishment.

Defendant's 30-year prison sentence for the statutory rape of his 11-year-old daughter was not disproportionate because under Miss. Code Ann. § 97-3-65(3)(c), the statutory rape of a child by an adult carried with it a maximum penalty of life imprisonment, as well as a minimum sentence of 20 years in prison, irrespective of whether it was one's first offense. Powell v. State, 49 So. 3d 166 (Miss. Ct. App. 2010).

Circuit court sentenced appellant to eight years, which clearly was within the statutory authority and not disproportionate to the crime; although appellant

claimed she was a first-time offender, she was previously charged three times for driving under the influence and she was addicted to marijuana and alcohol. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

Defendant's sentence conformed to the requirements of the habitual offender statute and the circuit court considered defendant's sentence in light of the facts and her previous criminal history; accordingly, she did not receive a grossly disproportionate sentence. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

Defendant's 15-year prison sentence for strong arm robbery was not disproportionate to the crime because the sentence was consistent with the State's recommendation, which defendant acknowledged prior to entering a guilty plea; the sentence was also within the statutory limits. Beamon v. State, 9 So. 3d 376 (Miss. 2009).

Defendant offered no cases supporting his argument that consecutive sentences for serious drug offenses that fell within the statutory limits were grossly disproportionate; therefore, the circuit judge did not abuse his discretion or violate defendant's constitutional right to be free from cruel and unusual punishment when he sentenced defendant. Parker v. State, 5 So. 3d 458 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 131 (Miss. 2009).

Defendant's sentence after she was convicted of aggravated assault was appropriate because it was not grossly disproportionate to the crime committed; the trial court noted that aggravated assault was a serious crime and the trial court considered the fact that defendant had a relatively clean record and that she had been consistently employed. White v. State, 958 So. 2d 290 (Miss. Ct. App. 2007).

In a case where defendant was convicted of three counts of fondling the 15-year-old victim under Miss. Code Ann. § 97-5-23, defendant's three 10-year consecutive sentences under Miss. Code Ann. § 99-19-21 were not disproportionate to defendant's crimes, were within the limits set by statute, and did not violate the Eighth Amendment. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Death sentence for capital murder of four-year-old child was not excessive or disproportionate under Miss. Code Ann. § 99-19-105(3)(c) and the Eighth and Fourteenth Amendments where evidence of strangulation and other factors was sufficient to support the jury's finding of statutory aggravating circumstances, the sentence was not excessive or disproportionate when compared to other factually similar cases where the death penalty was imposed, the sentence was not imposed under the influence of passion, prejudice, or any other factor, and the jury did not consider any invalid aggravating circumstances. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Defendant's sentence fell within the statutory guidelines and as such did not constitute cruel and unusual punishment; there was no constitutional right to a plea bargain and had a plea bargain been entered, the trial judge would not have been bound to accept the recommended sentence. Davis v. State, 910 So. 2d 1228 (Miss. Ct. App. 2005).

21. — Capital punishment, cruel and unusual punishment.

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Serving 25 years on death row did not constitute cruel and unusual punishment under the Eighth Amendment; defendant's argument that serving an excessive period on death row constituted cruel and unusual punishment in violation of his

constitutional rights failed. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

21.5. Lethal injection, cruel and unusual punishment.

Because Mississippi's lethal injection protocol appeared to be substantially similar to the protocol that was examined and upheld by the U.S. Supreme Court in Baze v. Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), a defendant's Eighth Amendment challenge to the lethal injection protocol in Mississippi was without merit. Bennett v. State, 990 So. 2d 155 (Miss. 2008).

28. Competency of person to be executed.

In an appeal of a capital murder conviction and death penalty, defendant, who claimed he was mentally retarded, was not entitled to a remand to the trial court for an evaluation of his mental capacity in light of the U.S. Supreme Court's ruling in Atkins v. Virginia; testimony from the state's psychologist indicated that defendant was malingering and that his functioning did not fall within the range of mentally retarded, and because defendant failed to proffer the information necessary to warrant an Atkins hearing, he was not entitled to a reconsideration of his sentence on this issue. Ross v. State, 954 So. 2d 968 (Miss. 2007).

30. Sentence appropriate.

Defendant's 60-year prison sentence for possession of a controlled substance with intent to sell as a habitual offender was not grossly disproportionate to the crime where defendant was aware of defendant's own criminal history and chose to proceed to trial; defendant was also apprised of the perilous situation defendant faced if defendant was found guilty at trial. Baskin v. State, 986 So. 2d 338 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 562 (Miss. 2008).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Defendant's sentence after being convicted of the sale of marijuana within a correctional facility was appropriate because the maximum fine and the minimum sentence that he received were both within the statutory limits of Miss. Code Ann. § 47-5-198(3). Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's robbery sentence was appropriate pursuant to Miss. Code Ann. § 97-3-79 because it was within the statutory limit. Further, it was not grossly disproportionate to the crime of which he was convicted. White v. State, 919 So. 2d 1029 (Miss. Ct. App. 2005).

AMENDMENT IX

CONSTRUCTION OF ENUMERATED RIGHTS

RESEARCH REFERENCES

Law Reviews. The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Phillip Bobbit's Constitutional Fate, 75 Miss. L.J. 495, Winter, 2006.

AMENDMENT XI

SUITS AGAINST STATES

RESEARCH REFERENCES

Law Reviews. Recent Decision: Constitutional Law -- Eleventh Amendment -- Abrogation of States' Sovereign Immunity in Title II of the Americans with Disabilities Act Held a Valid Exercise of Congress's Fourteenth Amendment Section Five Power, 74 Miss. L.J. 253, Fall, 2004.

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

JUDICIAL DECISIONS

6. Property interest.
7. Rules of court.
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12. Equal protection — In general.
15. Due process —In general.
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15. Due process — In general.
18.5 Prosecutorial misconduct.
28. Child support.
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54. Schools and school districts — In general.
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86. Administrative proceedings.
87. Civil practice and procedure — In general.
88. — Venue, civil practice and procedure.
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112. — Guilty plea, criminal practice and procedure.
117. — Identification of accused, criminal practice and procedure.
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131. — Sentencing proceeding, criminal practice and procedure.
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132.4 Parole.
132.5. Parole hearing.
133. —Cruel and unusual punishment, criminal practice and procedure.
135. —Appellate review, criminal practice and procedure.
137. Speedy trial — In general.
143. — Factors considered, speedy trial.
145. —Prejudice to defendant, speedy trial.
146. —Delay attributable primarily or solely to defendant, speedy trial.
155. —Appellate review, speedy trial.
165. Search and seizure—In general.
168. —Probable cause, search and seizure.
195. Right to counsel — In general.
203. —Invocation of right to counsel.
204. —Interrogation continued after counsel has been requested, right to counsel.
208. —Waiver, right to counsel.
210. Ineffective assistance of counsel—In general.
211. —Tests, ineffective assistance of counsel.
229. Environment and pollution.

6. Property interest.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations under the Fourteenth Amendment and Miss. Const. art. 3, § 14, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. Trainer v. State, 930 So. 2d 373 (Miss. 2006).

7. Rules of court.

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results; the warrant authorizing the blood alcohol test was valid and thus, defendant's constitutional rights were not violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

10. Validity of statutes, generally.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. Art. 4, § 87, Miss. Const. Art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

12. Equal protection — In general.

Defendant argued that trial court erred in accepting state's allegedly race-neutral reasons for striking two potential jurors in defendant's trial possession of cocaine, marihuana, and firearms violations; however, the state's reason for striking one juror, which was that she had a past experience in the courtroom that exhibited a distaste for the prosecutor, was an acceptable, race-neutral reason, and as to the second potential juror that was removed, the state's given explanation—that the juror worked across the street from defendant's home—was also an acceptable, race-neutral reason. Chester v. State, 935 So. 2d 976 (Miss. 2006).

15. Due process —In general.

Chancellor did not err in granting partial summary judgment to the county in dismissing the property owner's claims under Miss. Code Ann. § 19-5-22 and 42 U.S.C.S. § 1983 because the initial requirement for either a procedural or substantive due process claim was proving the plaintiff had been deprived by the

government of a liberty or property interest; otherwise, no right to due process could accrue. The property owner failed to prove injury to himself since it was the property owner's tenant, and not the property owner, who the lien was against. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Trial court did not err in failing to appoint an independent medical examiner where defendant appeared to base his argument on a hope that another medical expert would find another cause of death rather than having any specific evidence to support his defense. Conley v. State, 948 So. 2d 462 (Miss. Ct. App. 2007).

Arrestee's due process rights were not violated by an assistant district attorney's act of providing incorrect identifying information to police that led to a wrongful arrest in a false pretenses case because the overall actions were objectively reasonable, even though a picture of the correct perpetrator and a discrepancy regarding birth dates was contained in a file; as such, the assistant district attorney was entitled to qualified immunity. Stewart v. DA, 923 So. 2d 1017 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

17. — Procedural due process.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

Attorney had separate counsel to represent her interests at the hearing on contempt and sanctions and she did not object to the private nature of the hearing at the time it occurred and the court permitted her to call witnesses in her defense and to testify on her own behalf; the chancellor rescinded the portions of her contempt order sentencing the attorney to imprisonment; it was not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye under these circumstances. In re Spencer, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Rather than a denial of due process, the appellate court found that the student failed to take advantage of the process; the student was provided notice of and the opportunity to be heard at all of the hearings, including the one held on the summary judgment motion, and the student, for whatever reason, simply failed to attend the hearings. Harvey v. Stone County Sch. Dist., 982 So. 2d 463 (Miss. Ct. App. 2008).

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Student expulsion was affirmed because the student was not denied due process when the school failed to provide a list of witnesses prior to his hearing, since the student was apprised of the charges against him, the student knew that the hearing before the district's discipline review committee was in relation to his suspension for possession and selling controlled substances and "threatening to have a snitch jumped on and beat up," and the student was allowed to have legal counsel present to aid his defense against the charges. C.B. v. Bd. of Trs. (In the Interest of T.B.), 931 So. 2d 634 (Miss. Ct. App. 2006).

Defendant was properly denied post-conviction relief after he pled guilty to

armed robbery because the trial court did not err in not disqualifying the assistant district attorney on the ground that he had served as defendant's court-appointed attorney prior to serving as assistant district attorney. Confidential information was not used in the prosecution of the case, and defendant was not denied fair trial. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

15. Due process — In general.

In a trial for possession of cocaine, where the State subjected three witnesses to improper questioning which suggested a sexual relationship between defendant and her co-defendant, but the court instructed the jury to disregard the testimony, and there was no request for a mistrial, judging from the record as a whole, the particular questions by the prosecution did not establish a level of prejudice which would have merited granting a mistrial. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

In a trial for cocaine possession, the State's references to the fact that defendant's codefendant had pleaded guilty did not constitute plain error so as to merit reversal, where the codefendant was convicted of possession of different parcels of cocaine found in a different location, and where it was only after defense counsel asked an officer on cross-examination whether he asked the codefendant to change his statement and put any of the illegal drugs on defendant that the State brought into evidence the codefendant's guilty plea. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

18.5 Prosecutorial misconduct.

Defendant complained that a prosecutor's closing argument statement inferred that he might have been sexually inappropriate with the victim in the past; however, looking at the record of the entire trial, the actions of the State did not constitute prosecutorial misconduct and, even if the statements were erroneous, the error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict; thus, defendant was not denied his constitutional right to a fundamentally fair trial because of prosecutorial misconduct at closing argument. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

28. Child support.

While it could not be said that the increase in child support was unreasonable, it was not requested by the father; the chancellor committed error in sua sponte granting an increase in the amount of child support the mother would be required to pay. Purviance v. Burgess, 980 So. 2d 308 (Miss. Ct. App. 2007).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived, and the father was not deprived of notice or the ability to prepare. Bailey v. Fischer, 946 So. 2d 404 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

43. Labor and employment.

Even though a legislative amendment extinguished the employee's property rights as to his job, he was not denied due process where the Mississippi Department of Corrections terminated more than 160 employees; Laws of 2004, ch. 595, § 13 (Section 13) affected a general class of people due to a mandated reorganization of the department, Miss. Code Ann. § 25-9-127(1), and thus, the employee was entitled to due process only as provided under Section 13. Hemba v. Miss. Dep't of Corr., 998 So. 2d 1003 (Miss. 2009).

Employee was not denied due process when he received notice that he was placed on leave but not informed of the type of leave he was placed on or given a formal notice of suspension where the employee was placed on administrative leave with pay pending the resolution of the investigation, and once the investigation was concluded the employee was properly noticed of the employer's intention to terminate his employment. Payne v. Miss. Dep't of Mental Health, 964 So. 2d 582 (Miss. Ct. App. 2007).

45. Parolees and probationers.

Denial of the inmate's petition for writ of habeas corpus was affirmed as (1) Miss. Code Ann. § 47-7-17 did not create a constitutionally protected liberty interest in parole; thus, the inmate's right to due process was not violated under U.S. Const. amends. V and XIV, (2) the inmate waived his right to argue that he was prejudiced by the Parole Board's failure to publish notice of his parole hearing as it was not raised below, and (3) the inmate did not argue in his petition that he had ever been denied the opportunity to call witnesses or that the Parole Board refused to listen to their testimony. Way v. Miller, 919 So. 2d 1036 (Miss. Ct. App. 2005).

47. Professional regulation.

Massage therapist's due process rights were not violated when a Mississippi State Board of Massage Therapy member investigated the client's complaint against the therapist and later participated in the administrative hearing because the Board member's dual capacity as investigator and hearing participant was procedurally correct. Dawson v. Miss. State Bd. of Massage Therapy, 949 So. 2d 829 (Miss. Ct. App. 2006).

54. Schools and school districts — In general.

56. — Student conduct and discipline, schools and school districts.

Student was denied his due process rights during disciplinary proceedings against him where not only was the student not allowed to pose questions to the other students involved in the incident, who were not present at the hearing, he had no right to even know the names of the students who accused him; the student received absolutely no notice of the hearing in which the school district was to review the Appeals Committee's recommendation of expulsion for one year and render a final decision on the disciplinary proceeding, and a one-year expulsion required more than the minimal due process protections of notice and right to be heard. Hinds County Sch. Dist. Bd. of Trs. v. R.B., 10 So. 3d 495 (Miss. Ct. App. 2007), reversed by 10 So. 3d 387, 2008 Miss. LEXIS 606 (Miss. 2008).

75. Workers' compensation.

Award of workers' compensation benefits to an employee was overturned where, as a result of the Mississippi Workers' Compensation Commission's departure from its own procedural rules, certain medical records were entered into evidence that erroneously provided medical causation relating the employee's focal dystonia to the employee's work as a card dealer for the employer; the mandates of due process were not adhered to by the commission. Robinson Prop. Group v. Newton, 975 So. 2d 256 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 284 (Miss. 2008).

77. Racial discrimination — In general.

81. — Jury selection, racial discrimination.

In a capital murder case, defendant's rights under the Equal Protection Clause were violated by the state's continuous striking of African-American jurors, whose views on the death penalty were virtually indistinguishable from those of similarly situated white jurors who went unchallenged by the state, thereby raising an inference of racial discrimination. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

In defendant's capital murder case, the striking of an African-American juror was suspect because there was no evidence in the record to show that she had any connection with members of defendant's family, despite the fact that she had previously worked at the same business as

those family members. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

In defendant's capital murder case, the striking of an African-American juror was suspect because his opposition to the death penalty was not as strong as that of two white jurors who served, and the genuineness of the juror's prior jury service as a reason for the state to strike him was questionable since the state failed to voir dire other white jurors concerning their prior jury service. Flowers v. State, 947 So. 2d 910 (Miss. 2007).

State's actions in striking an African American juror in a capital murder case were specious as there was no evidence in the record to support the state's proffered reason for striking her, and it appeared that the state fabricated a supposedly race-neutral reason in an attempt to strike yet another African American juror. Flowers v. State, — So. 2d —, 2006 Miss. LEXIS 356 (Miss. June 29, 2006), opinion withdrawn by 2007 Miss. LEXIS 97 (Miss. Feb. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 947 So. 2d 910, 2007 Miss. LEXIS 24 (Miss. 2007).

Peremptory challenge exercised by the state against one African American juror in a capital murder case was clearly pretextual as there was no basis in the record for two of the grounds proffered by the state, and the state's third ground was predicated on the jury's acquaintance with defendant's sister 10 years prior, a tenuous relationship at best. Flowers v. State, — So. 2d —, 2006 Miss. LEXIS 356 (Miss. June 29, 2006), opinion withdrawn by 2007 Miss. LEXIS 97 (Miss. Feb. 1, 2007), opinion withdrawn by, substituted opinion at, remanded by 947 So. 2d 910, 2007 Miss. LEXIS 24 (Miss. 2007).

81.5. — Race-neutral exercise of peremptory challenges, impartial jury.

Defendant's right to a fair trial under Batson was not violated by the prosecutor's use of peremptory strikes because a large number of potential jurors knew defendant, defendant's mother, defendant's family, potential witnesses in the case, or the attorneys; the other peremptory challenges by the state were used against a juror whose son was a witness, two jurors who were close friends of the family, and another juror who had a close family member prosecuted by the same district attorney's office. Fisher v. State, 989 So. 2d 893 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 429 (Miss. 2008).

Where defendant raised a Batson challenge during voir dire, the prosecutor gave gender as her race-neutral reason for striking an African-American juror; allowing the state to exclude the potential juror based on his gender was a violation of the equal protection clause; the entire judicial process was infected, warranting a new trial. McGee v. State, 953 So. 2d 211 (Miss. 2007).

86. Administrative proceedings.

In a case involving a certificate of need, procedural due process rights were not violated where all of the steps under Miss. Code Ann. § 41-7-197 were followed; no parties to the proceeding, no health care facilities in the same health care service area, and no others originally noticed, appeared to request a new hearing. The issue of import to satisfy the requirements of the Mississippi State Health Plan was not the specific route, but rather the number of procedures, and notice of a new route was given. Miss. State Dep't of Health v. Baptist Mem. Hospital-DeSoto, Inc., 984 So. 2d 967 (Miss. 2008).

Trial court erred in overturning a board's denial of an application for a funeral service license where the applicant stated that he planned to do his training in Mississippi, but actually worked in Tennessee; at the board's hearing, the applicant was allowed to present witnesses and other forms of evidence, and his due process concerns were adequately addressed. Miss. State Bd. of Funeral Servs. v. Coleman, 944 So. 2d 92 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 730 (Miss. 2006).

There was no due process violation with respect to doctors on the Mississippi Public Employees' Retirement System Medical Board examining claimants, making a diagnosis and recommendation, and then voting as members of the Medical Board on the disability claims; therefore, the denial of a disability claim was upheld. Flowers v. Public Emples. Ret. Sys., — So. 2d —, 2006 Miss. App. LEXIS 247 (Miss.

Ct. App. Apr. 4, 2006), opinion withdrawn by, substituted opinion at 952 So. 2d 972, 2006 Miss. App. LEXIS 778 (Miss. Ct. App. 2006).

87. Civil practice and procedure — In general.

88. — Venue, civil practice and procedure.

Mississippi federal district court held that USCS Const. Amend. 14 due process principles were not offended by its finding that venue in Mississippi was proper in a Mississippi attorney's breach of contract diversity suit against out-of-state attorneys because defendants had approached plaintiff in Mississippi to perform the multi-district litigation services upon which the suit was based. Street v. Smith, 456 F. Supp. 2d 761 (S.D. Miss. 2006).

89. —Long arm jurisdiction, civil practice and procedure.

In a medical-malpractice action, the circuit court did not err in finding that traditional notions of fair play and substantial justice were not offended in exercising personal jurisdiction over the doctor because nothing in the record suggested that the trial court was an inefficient method of resolving the dispute or that it imposed an undue burden to have the doctor defend the suit in Mississippi. Dunn v. Yager, 58 So. 3d 1171 (Miss. 2011).

94. — Contempt, civil practice and procedure.

Chancellor did not err finding the attorney in contempt for failing to appear at the January 9 hearing where since there was no requirement that the attorney's conduct be willful under Miss. Unif. Ch. Ct. R. 1.05, there was no merit to her argument that the contempt judgment had to be set aside for lack of willfulness on her part; it was not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye and the chancellor did not become substantially involved with the prosecution of the contempt charge. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

101. Probate practice and procedure.

Miss. Code Ann. § 91-1-15 does require certain criteria, including an option to prove paternity of any illegitimate children within a restricted period after the putative father's death, Miss. Code Ann. § 91-1-15 (2004); these requirements place a higher burden on illegitimate children to inherit from their fathers than legitimate children. However, the State has a legitimate interest in protecting the family and the estates of the deceased by requiring adjudication of paternity within a reasonable timeframe; the purpose of § 91-1-15 in the context of intestate succession is to (1) avoid litigation of stale or fraudulent claims, (2) cause fair and just disposal of property, and (3) facilitate repose of title to real property. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

Appellants failed properly to adjudicate themselves as the illegitimate children of their putative father in the time prescribed by Miss. Code Ann. § 91-1-15 and as such, the petition to be determined heirs of the decedent was barred by the time provision of § 91-1-15; additionally, § 91-1-15 did not violate the Equal Protection Clause or the Due Process Clause of the United States Constitution. Further, appellants were not deprived of either their procedural or substantive due process rights as Mississippi had a legitimate state interest in the legislation propounded in § 91-1-15, therefore, the statute did not violate any substantive due process rights; in addition, appellants had notice of the putative father's death and would have been afforded a hearing for adjudication of paternity, however, they failed to make such a petition within the statutory limits of § 91-1-15. In re Estate of McCullough v. Yates, 32 So. 3d 403 (Miss. 2010).

104. Criminal practice and procedure — In general.

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's

right to a fair trial was preserved. Welde v. State, 3 So. 3d 113 (Miss. 2009).

Where no errors raised warranted granting post-conviction relief, defendant was not deprived of a fair trial due to the cumulative effect of the alleged errors. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

112. — Guilty plea, criminal practice and procedure.

Because defendant was not informed of the elements of the charge as to his guilty plea, the appellate court reversed and remanded for a hearing as to whether defendant had the elements explained to him prior to pleading guilty, and whether there was a factual basis for the plea. Jones v. State, 936 So. 2d 993 (Miss. Ct. App. 2006).

Record indicated that the trial court, at sentencing, had some evidence that defendant committed the offense, and whether such evidence was substantial was difficult to ascertain; there was some question whether the plea following the second colloquy was knowing, intelligent and voluntary, and the supreme court could see additional facts which raised doubt as to the voluntariness of her plea. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because his guilty plea was voluntary; defendant stated in his petition to enter a plea of guilty that he was entering the plea freely, voluntarily, and of his own accord, with full understanding of all matters set forth in the indictment. Defendant also acknowledged in the petition that he could receive a sentence of zero to 60 years if convicted for the sale of cocaine as an enhanced offender, and that by pleading guilty he could receive a sentence of zero to 30 years. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

117. — Identification of accused, criminal practice and procedure.

Identification of defendant was not impermissibly suggestive because the men in the photographs were all African-American males, had the same build, and possessed the same facial features in accordance with the store clerk's description of the armed robber. The fact that defendant was the only individual wearing a coat was a minor difference and did not rise to the level of impermissible suggestion. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant's due process rights were violated by the use of a single set of dental molds in a murder case was procedurally barred since the issue was capable of being raised at trial or on direct appeal; even if it was not, identification of defendant by an eyewitness was distinguishable from an expert's conclusion that defendant inflicted a particular injury based on scientific analysis. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

118. — Discovery, criminal practice and procedure.

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other

evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's rights under Brady were not violated by the trial court's denial of defendant's motion for disclosure of his arresting officers and the criminal histories of the codefendants because defendant failed to show that the evidence was favorable or that the prosecution even possessed the evidence; no proof existed in the record that defendant could not obtain the evidence with reasonable diligence, and defendant could not prove to a reasonable probability that the outcome of the trial would have been different had this evidence been in his possession. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

119. — Jury selection, criminal practice and procedure.

Although defendant's rights under the Equal Protection Clause were violated by the state's striking of one male juror, a court of appeals erred by reversing armed robbery convictions under the plain error standard of review because there was no prejudice to the outcome of the trial since the jury was substantially gender-neutral. McGee v. State, — So. 2d —, 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006), opinion withdrawn by, substituted opinion at, affirmed by, remanded by 953 So. 2d 211, 2007 Miss. LEXIS 19 (Miss. 2007).

Defendant's Batson challenge was properly rejected by the trial court because the fact that the State exercised peremptory strikes on two African-American veniremen did not establish a prima facie case of racial discrimination. Gilbert v. State, 934 So. 2d 330 (Miss. Ct. App. 2006).

121. — Conduct of trial, criminal practice and procedure.

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221 (Miss. 2007).

124. — Hearsay evidence, criminal practice and procedure.

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

126. — Expert witnesses, criminal practice and procedure.

Post-conviction relief was denied in a capital murder case because the issue of whether defendant was denied a fair trial based on alleged falsehoods and misrepresentations by an expert was procedurally barred since it was capable of being raised on direct appeal. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

127. — Arguments to jury, criminal practice and procedure.

Considerable prejudice resulted from the prosecutor's inappropriate statements to the jury and the supreme court was unable to say, beyond a reasonable doubt, that such prejudice was overcome by the evidence; thus, defendant's sentence and conviction were reversed and remanded to the trial court for a new trial.

131. — Sentencing proceeding, criminal practice and procedure.

In a case in which defendant appealed his sentence of death by lethal injection

for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

132. — Sentence and punishment, criminal practice and procedure.

Defendant's motion for post-conviction relief was properly denied because his sentence was not unconstitutionally vague and subject to more than one interpretation; he was sentenced to 18 years in prison with 12 years to serve, and 18 minus 12 left six years suspended, which is what the language in the sentencing order reflected. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

There was no equal protection violation when appellant received a 15-year sentence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. McKenzie v. State, 946 So. 2d 392 (Miss. Ct. App. 2006).

Defendant's sentence of two days in jail for driving under the influence and failing to dim his headlights was upheld where there was no absolute constitutional bar to sentence enhancement at a second trial; an on-the-record explanation of an enhanced sentence was not warranted after a trial de novo in a superior court following an appeal from an inferior court. Carr v. State, 942 So. 2d 816 (Miss. Ct. App. 2006).

Because the record was clear that defendant was six days past his 18th birthday at the time of the capital murder, he was over the age of 18, and was therefore eligible for the death penalty. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Harsher sentence imposed on defendant was proper where, in his second sentencing hearing, the judge heard new evidence concerning the events of the crimes and that evidence led him to believe that the crime was more heinous than the judge originally believed. There was no indication of vindictiveness and neither the double jeopardy provision nor the Equal Protection Clause imposed an absolute bar to the more severe sentence upon reconviction. Fowler v. State, 919 So. 2d 1129 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 56 (Miss. 2006).

132.4 Parole.

Court rejected the inmate's claim that the parole board's discretion to deny him parole denied him equal protection as provided under the Fifth and Fourteenth Amendments, because the inmate did not argue that he was a member of a suspect class or that a fundamental right had been violated, and the State naturally had an interest in protecting members of society from dangerous criminals and in punishing criminals for failing to abide by the law; therefore, a rational relationship existed between the parole board's discretion and the State's interests. Edmond v. Miller, 942 So. 2d 203 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 718 (Miss. 2006).

132.5. Parole hearing.

Parole board's failure to give the inmate a psychiatric examination prior to his parole hearing did not deny the inmate due process as provided in the Fourteenth Amendment; Miss. Code Ann. § 47-7-3 did not require a psychiatric evaluation prior to the inmate's parole hearing; rather the language of § 47-7-3 clearly stated that the inmate must otherwise be eligible for parole before he was entitled to a psychiatric evaluation. Also, because Miss. Code Ann. § 47-7-3 and Miss. Code Ann. § 47-7-17 use the permissive "may"

and not the mandatory "shall," the Mississippi Supreme Court has held that the statutes do not confer a constitutionally recognized liberty interest in parole or a psychiatric examination. Edmond v. Miller, 942 So. 2d 203 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 718 (Miss. 2006).

133. —Cruel and unusual punishment, criminal practice and procedure.

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's death sentence was proper pursuant to Miss. Code Ann. §§ 99-19-101(7), 99-19-105(3) and the Eighth and Fourteenth Amendments where it was not imposed under the influence of passion, prejudice, or any other factor. Additionally, many of defendant's complaints about various statements were procedurally barred for the failure to make a contemporaneous objection. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Supreme Court of Mississippi vacated the death sentence imposed on a defendant convicted of capital murder. The death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution, because defendant was only 17 years old when he committed the crime. Dycus v. State, — So. 2d —, 2005 Miss. LEXIS 594 (Miss. Sept. 15, 2005).

135. —Appellate review, criminal practice and procedure.

Defendant's assertion that he was denied the right to appeal was misplaced where his brief had been filed with the appellate court and the issues raised were before the appellate court for consideration. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

137. Speedy trial — In general.

143. — Factors considered, speedy trial.

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

145. —Prejudice to defendant, speedy trial.

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App.

2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

146. —Delay attributable primarily or solely to defendant, speedy trial.

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

155. —Appellate review, speedy trial.

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

165. Search and seizure—In general.

Where police found drugs in the vehicle of a minor, he was charged with possession of more than thirty grams of marijuana. The circuit court did not abuse its discretion by denying his untimely motion to transfer the case to drug court; defendant did not have an equal protection claim since no one has the right to attend the drug court. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

168. —Probable cause, search and seizure.

Search of defendant's automobile was not illegal as the car was lawfully stopped for speeding and once the trooper smelled marijuana, he had probable cause to search the vehicle; the trooper's legal search of the vehicle yielded the money and the Carpet Fresh spray can. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759 (Miss. Ct. App. 2009).

195. Right to counsel — In general.

203. —Invocation of right to counsel.

Defendant's capital murder convictions were proper where his Fifth, Sixth, and Fourteenth Amendment rights to counsel and to remain silent were not violated. He made no objection at trial; there was no testimony concerning defendant's use of counsel or his right to remain silent; and the State's questioning was designed solely to elicit a chronological version of the events involved in the investigation of the murders not the fact that the defendant requested an attorney during the State's investigation. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

204. —Interrogation continued after counsel has been requested, right to counsel.

Confronting a suspect with the incriminating evidence compiled against him after he has invoked his right to counsel, and without any initiation on the part of the suspect, is precisely the kind of psychological ploy that definition of interrogation in Innis was designed to prohibit. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

Defendant's right to counsel was violated by police-initiated interrogation after he asserted his right to counsel because an officer showed defendant the evidence file in an attempt to have him reconsider his request for counsel; a tactic that proved successful as defendant was not prompted to speak until he reviewed the evidence. Because the actions of the officer constituted police-initiated custodial interrogation, a valid waiver could not be established simply by showing that defendant responded to the interrogation. Pannell v. State, 7 So. 3d 277 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 154 (Miss. 2009).

208. —Waiver, right to counsel.

In a case in which defendant argued that the trial court should have sup-

pressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

210. Ineffective assistance of counsel—In general.

211. —Tests, ineffective assistance of counsel.

Nothing in the record affirmatively showed constitutional ineffectiveness and defendant failed to show prejudice; thus, defendant failed to meet his Strickland burden. Givens v. State, 967 So. 2d 1 (Miss. 2007).

229. Environment and pollution.

Where the Mississippi Commission on Environmental Quality found that the tire company had committed numerous violations under a National Pollutant Discharge Elimination System (NPDES) permit, the tire company failed to demonstrate that it was singled out, or that it was selected for prosecution based upon protected classifications. Further, the appellate court deferred to the Mississippi Department of Environmental Quality's decision regarding the methodology limits implemented by the agency which were based on concentration limits rather than mass limits; in the latter context, the Commission acted within its power in determining that the permit was not "fatally flawed" under the methodology implemented. Titan Tire of Natchez, Inc. v. Miss. Comm'n on Envtl. Quality, 891 So. 2d 195 (Miss. 2004); Rucker v. State, 909 So. 2d 137 (Miss. Ct. App. 2005).

Cited in: Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

RESEARCH REFERENCES

ALR. When Does Use of Taser Constitute Violation of Constitutional Rights. 45 A.L.R.6th 1.

Law Reviews. Recent Decision: Constitutional Law -- Eleventh Amendment -- Abrogation of States' Sovereign Immunity in Title II of the Americans with Disabilities Act Held a Valid Exercise of Congress's Fourteenth Amendment Section Five Power, 74 Miss. L.J. 253, Fall, 2004.

Constitutional Limits on State Taxation of a Nonresident Trustee: Gavin Misinterprets and Misapplies Both Quill and McCulloch, 76 Miss. L.J. 1, Fall, 2006.

THE CONSTITUTION OF THE STATE OF MISSISSIPPI

Article 15. Amendments to the Constitution

ADOPTED NOVEMBER 1, A.D., 1890

ARTICLE 1.

DISTRIBUTION OF POWERS.

§ 1. Powers of government.

JUDICIAL DECISIONS

8. Judicial powers and functions—In general.
12. — — Construction of legislation, judicial powers and functions.
14. — — Review of administrative decisions, judicial powers and functions.
16. Encroachment—In general.

8. Judicial powers and functions—In general.

12. — — Construction of legislation, judicial powers and functions.

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (U.S. 2010).

14. — — Review of administrative decisions, judicial powers and functions.

In an action arising out of the termination of an affiliation agreement, a chancellor violated the doctrine of separation of powers, Miss. Const. Art. 1, § 1, by not affording deference to the Board of Trustees of Mississippi State Institutions of Higher Learning's interpretation and implementation of its own policy regarding the independence of affiliated entities. Limbert v. Miss. Univ. for Women Alumnae Ass'n, 998 So. 2d 993 (Miss. 2008).

16. Encroachment—In general.

Legislator could not simultaneously serve dual roles as a state representative and a city's selectman because the service in both roles violated separation of powers; the role of state representative was legislative in nature, and the role of selectman was a mixed legislative and executive role. Myers v. City of McComb, 943 So. 2d 1 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

A person may not serve as a member of a county board of supervisors while also serving as an elected school board member. Chaney, May 16, 2003, A.G. Op. 03-

0232.

The separation of powers doctrine set forth in the Mississippi Constitution prohibits a person from serving simultaneously as a member of the Mississippi House of Representatives and as a member of the Mississippi Civil War Battlefield Commission. Lingle, Sept. 19, 2003, A.G. Op. 03-0456.

A deputy sheriff, upon being sworn in as a city councilman, must vacate his position as a deputy sheriff. Stokes, May 21, 2004, A.G. Op. 04-0206.

A deputy sheriff of a county is an officer in the executive branch of government, therefore, the separation of powers provision of the Mississippi Constitution would apply to this situation and prohibit the party in question from holding both offices. Stokes, May 21, 2004, A.G. Op. 04-0206.

The separation of powers doctrine would prohibit a member of the county board of supervisors from also serving as an investigator with the district attorney's office. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed by UPS or Fed Ex. Abron, June, 21, 2004, A.G. Op. 04-0241.

The separation of powers doctrine would not prohibit a member of the county board of supervisors from also serving as a guidance counselor employed by the Department of Corrections in a state prison, or being employed by a private prison. Abron, June, 21, 2004, A.G. Op. 04-0241.

A member of the county board of supervisors would not violate the separation of powers doctrine by also being employed as a security guard by a local bingo hall. Abron, June, 21, 2004, A.G. Op. 04-0241.

The Mississippi Constitution prohibits an individual from holding both the office of alderman and deputy sheriff at the same time. Curtis, July 23, 2004, A.G. Op. 04-0341.

Argument that a city councilman is not subject to the separation of powers doctrine because under the city's special charter that office exercises both legislative and executive powers lacks merit. McGee, Aug. 6, 2004, A.G. Op. 04-0333.

Upon being sworn in as a member of the House of Representatives, a person vacated his position as a school district trustee. Kemp, Aug. 6, 2004, A.G. Op. 04-0365.

Asking questions and seeking information on the operations of a municipal department by a city councilman for the purposes of reporting back to the full council is permitted. However, if the line is crossed between gathering information and actually making administrative decisions for the department, a violation of the separation of powers doctrine may exist. Rupp, Oct. 1, 2004, A.G. Op. 04-0449.

Any authority a board of aldermen may have with regard to employment, termination, and/or suspension without pay, must be exercised by the body as a whole. An individual alderman has no authority in this regard and no authority to direct the actions of individual employees. Cook, Oct. 15, 2004, A.G. Op. 04-0503.

If the Legislature has decided not to renew the authority of a state agency, then the Governor lacks the authority to re-create that agency using an executive order. McCoy, May 20, 2004, A.G. Op. 04-0227.

An individual can serve as a city alderman and bailiff simultaneously without being in violation of this section. Stockton, Apr. 11, 2005, A.G. Op. 05-0197.

The Separation of Powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, prohibits an individual from holding two offices in two different branches of government simultaneously. An individual may simultaneously serve as a member of a county school board and as county circuit clerk because both offices are within the executive branch of the government. Maples, February 16, 2007, A.G. Op. #07-00074, 2007 Miss. AG LEXIS 22.

Under the separation of powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, one may not simultaneously hold the offices of alderman and school board member because the office of alderman is in the legislative branch of government and the office of school board member is in the executive branch of government. Gibbs, March 9, 2007, A.G. Op. #07-107, 2007 Miss. AG LEXIS 73.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 2. Encroachment of power.

JUDICIAL DECISIONS

1. Encroachment of power — In general.
4. — — Judicial branch, encroachment of power.
7. Incompatible offices and vacation thereof.

1. Encroachment of power — In general.

4. — — Judicial branch, encroachment of power.

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (U.S. 2010).

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ATTORNEY GENERAL OPINIONS

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The separation of powers doctrine set forth in the Mississippi Constitution prohibits a person from serving simultaneously as a member of the Mississippi House of Representatives and as a member of the Mississippi Civil War Battlefield Commission. Lingle, Sept. 19, 2003, A.G. Op. 03-0456.

The separation of powers doctrine applies to local government. Griffin, May 21, 2004, A.G. Op. 04-0200.

A person holding both the positions of city councilman and trustee for a county owned hospital would violate the separation of powers clause of the Mississippi Constitution. Griffin, May 21, 2004, A.G. Op. 04-0200.

A deputy sheriff, upon being sworn in as a city councilman, must vacate his position as a deputy sheriff. Stokes, May 21, 2004, A.G. Op. 04-0206.

A deputy sheriff of a county is an officer in the executive branch of government, therefore, the separation of powers provision of the Mississippi Constitution would apply to this situation and prohibit the party in question from holding both offices. Stokes, May 21, 2004, A.G. Op. 04-0206.

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Any authority a board of aldermen may have with regard to employment, termination, and/or suspension without pay, must be exercised by the body as a whole. An individual alderman has no authority in this regard and no authority to direct the actions of individual employees. Cook, Oct. 15, 2004, A.G. Op. 04-0503.

If the Legislature has decided not to renew the authority of a state agency, then the Governor lacks the authority to re-create that agency using an executive order. McCoy, May 20, 2004, A.G. Op. 04-0227.

Service by one individual in the positions of police chief and alderman simultaneously would be a violation of Miss. Const. Art. 1, § 2. Miller, Jan. 21, 2005, A.G. Op. 05-0013.

Firefighter employed by one municipality may lawfully run for the position of alderman in another municipality and, if elected may simultaneously serve in those two positions. Davis, Mar. 11, 2005, A.G. Op. 05-0106.

An individual can serve as a city alderman and bailiff simultaneously without being in violation of this section. Stockton, Apr.11, 2005, A.G. Op. 05-0197.

The separation of powers provision of the Mississippi Constitution would not prohibit someone from simultaneously being employed in a non-law enforcement administrative capacity for the sheriff's office and on the city council for a municipality in the same county. Faneca, July 1, 2005, A.G. Op. 05-0328.

Simultaneous service as a justice court judge and a municipal employee would not automatically be a violation of the separation of powers clause. Only if each position exercises core powers of the branch of government in which it may be found will a violation occur. Glover, July 8, 2005, A.G. Op. 05-0342.

It would be a violation of the separation of powers doctrine for a county prosecuting attorney to simultaneously serve as a municipal court judge, and likewise for a town board attorney to simultaneously serve as a municipal court judge. Ready, Aug. 8, 2005, A.G. Op. 05-0363; but see Fondren, Dec. 16, 2005, A.G. Op. 05-0562.

Since the position of county fire coordinator and the office of alderman exercise core powers of two different departments of government, executive and legislative, Miss. Const., Art. 1, § 2, would prohibit an individual from occupying said position and office at the same time. Smith, Aug. 8, 2005, A.G. Op. 05-0380.

The separation of powers doctrine would not prohibit a legislator from being

employed as a physician by a community hospital. Smith, Aug. 12, 2005, A.G. Op. 05-0424.

A city attorney may also serve as a member of the house of representatives in the state legislature. Croft, Aug. 26, 2005, A.G. Op. 05-0431.

Under the separation of powers doctrine there is no prohibition against an individual's simultaneously serving as city alderman and a county "fire training officer." Cobbins, Oct. 7, 2005, A.G. Op. 05-0486.

There would be no separation of powers violation for an individual to serve as municipal court judge and as the board attorney for the county utility district. To the extent this opinion conflicts with prior opinions on the issue of board attorneys/ separation of powers conflicts, they are hereby withdrawn, including, but not limited to: Ready, August 8, 2005, A.G. Op. 05-0363 and Lowrey, Aug. 23, 1995, A.G. Op. 95-0505, Fondren, Dec. 16, 2005, A.G. Op. 05-0562.

Since a county board of supervisors exercises judiciary branch powers, and a regional solid waste management authority is in the executive branch, the separation of powers doctrine prohibits a supervisor in a non-situs county or district for the facility from serving on the waste management authority board. Akins, July 17, 2006, A.G. Op. 06-0335.

For purposes of application of the separation of powers doctrine, under a council-manager form of government, a council member is an officer in the legislature branch of government. Tynes, July 27, 2006, A.G. Op. 06-0277.

For purposes of application of the separation of powers doctrine, a local school board member is an officer exercising powers in the executive branch of government. Bounds, July 27, 2006, A.G. Op. 06-0276.

There is no constitutional prohibition against an individual serving simultaneously as a member of the county school board and as a member of the county zoning commission. Meadows, Sept. 1, 2006, A.G. Op. 06-0418.

The separation of powers doctrine would prohibit persons from simultaneously serving on the county board of supervisors and the initial board of directors for a public improvement district. Dulaney, Oct. 13, 2006, A.G. Op. 06-0497.

An individual serving as both a state representative and a member of a city preservation commission would violate the doctrine of separation of powers. Collins, Nov. 10, 2006, A.G. Op. 06-0565.

A justice court judge may also serve as city attorney without violating the separation of powers doctrine. Perkins, Nov. 10, 2006, A.G. Op. 06-0577.

Where transfer of title to a building by a company to a county is followed by temporary retention of possession by the donating company, and the eighteen-months possession of the building by the company is presumably far less than the building's appraisal value, therefore, the possession of the building after transfer would not be an impermissible donation. Crow, Dec. 8, 2006, A.G. Op. 06-0583.

An individual is prohibited from simultaneously serving as director of parks and recreation for a city and as a member of the county board of supervisors. Wilcox, Dec. 8, 2006, A.G. Op. 06-0591.

There is no prohibition against an alderman being a candidate for county school superintendent. Shoemake, Dec. 22, 2006, A.G. Op. 06-0630.

The Separation of Powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, prohibits an individual from holding two offices in two different branches of government simultaneously. An individual may simultaneously serve as a member of a county school board and as county circuit clerk because both offices are within the executive branch of the government. Maples, February 16, 2007, A.G. Op. #07-00074, 2007 Miss. AG LEXIS 22.

Under the separation of powers doctrine, Miss. Const. of 1890, Art. 1, §§ 1-2, one may not simultaneously hold the offices of alderman and school board member because the office of alderman is in the legislative branch of government and the office of school board member is in the executive branch of government. Gibbs, March 9, 2007, A.G. Op. #07-107, 2007 Miss. AG LEXIS 73.

The separation of powers doctrine, Miss. Const. of 1890, Art. 1, § 2, does not prohibit a city firefighter from serving simultaneously as a county supervisor.

Although the two positions are within separate branches of the county government, a firefighter does not exercise substantial policy-making power at the core of the executive branch so there is no conflict. Inquiries concerning potential ethics issues should be referred to the Ethics Commission. Bowen, March 2, 2007, A.G. Op. #07-00094, 2007 Miss. AG LEXIS 85.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

Article 3.

Bill of Rights.

§ 5. Government originating in the people.

JUDICIAL DECISIONS

5. Access to courts.

Circuit court properly dismissed a prisoner's 42 U.S.C.S. § 1983 action against a circuit court clerk alleging she violated his access to courts right; based on the prisoner's own dilatory actions related to certain summonses, the isolated failure of the clerk to issue the summonses was not an actionable interference with the prisoner's access to courts right. Duncan v. Johnson, 14 So. 3d 760 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 374 (Miss. 2009).

§ 11. Peaceful assemblage; right to petition government.

RESEARCH REFERENCES

ALR. Validity of Restrictions Imposed during National Political Conventions Impinging upon Rights to Freedom of Speech and Assembly under First Amendment. 46 A.L.R.6th 465.

§ 13. Freedom of speech and press; libel.

JUDICIAL DECISIONS

1. In general.
4.5. Judicial comments.
9. Employment and labor relations.

1. In general.

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

4.5. Judicial comments.

Order that the judge be suspended from office for a period of one year was appropriate because his commentary on Caucasian officials and their African-American appointees in his jurisdiction was not wor-

thy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity. The comments were not made within the content, form, or context of a matter of legitimate public concern. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

9. Employment and labor relations.

Because plaintiff fireman's letter to a newspaper addressed a matter of public concern, how candidates would treat city employees and their raises, and defendant city submitted no evidence the letter interfered with work relationships or the fireman's job, the city had to show cause why summary judgment should not enter on the fireman's Miss. Const. Art. 3, § 13 demotion/retaliation claim. Montgomery v. Mississippi, 498 F. Supp. 2d 892 (S.D. Miss. 2007).

RESEARCH REFERENCES

ALR. Construction and Application of Federal and State Constitutional and Statutory Speech or Debate Provisions. 24 A.L.R.6th 255.

First Amendment Protection Afforded to Web Site Operators. 30 A.L.R. 6th 299.

Validity of Restrictions Imposed during National Political Conventions Impinging upon Rights to Freedom of Speech and Assembly under First Amendment. 46 A.L.R.6th 465.

§ 14. Due process.

JUDICIAL DECISIONS

1. In general.
2. Notice and hearing.
7. Employment and labor relations.
8. Judicial proceedings—In general.
11. — — Divorce, alimony, maintenance, and support, judicial proceedings.
12. — — Child custody, judicial proceedings.
13. — — Contempt, judicial proceedings.
14. — — Real property, judicial proceedings.
18. Crimes and criminal procedure — In general.
19. — — Admissibility of evidence, crimes and criminal procedure.
20. — — Affidavits or indictments, crimes and criminal procedure.
21. — — Assistance of counsel, crimes and criminal procedure.
24. — — Confessions, crimes and criminal procedure.
24.5. — — Contempt, crimes and criminal procedure.
25. — — Cross examination, crimes and criminal procedure.
26. — — Disclosure of evidence, crimes and criminal procedure.
27. — — Disqualification of judge, crimes and criminal procedure.
28. — — Jury trial, crimes and criminal procedure.
29. — — Examination and qualification of jurors, crimes and criminal procedure.
30. — — Fair trial, crimes and criminal procedure.
32. — — Guilty pleas, crimes and criminal procedure.
33. — — Identification of defendant, crimes and criminal procedure.
35. — — Instructions, crimes and criminal procedure.
38. — — Production of evidence and witnesses, crimes and criminal procedure.
39. — — Sentence and punishment, crimes and criminal procedure.
41. — — Vague or indefinite statutes, crimes and criminal procedure.
42. Prisons and prisoners—In general.
45. — — Parole, prisons and prisoners.
46. — — Probation, prisons and prisoners.
53. Racial discrimination.
55. Use of property—In general.

56. — — Zoning laws, use of property.
56.5. Eminent domain.
60. Regulation of business and professions — In general.
66. — — Physicians, regulation of business and professions.
73. Workers compensation.
76. Education, schools and students.
79. Miscellaneous.

1. In general.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. art. 4, § 87, Miss. Const. art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

2. Notice and hearing.

Insurance company's due process rights were violated by the county court's entry of sanctions against it in an action to which it was not a party and had not received formal notice. State Farm Mut. Auto. Ins. Co. v. Jones, 37 So. 3d 87 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 292 (Miss. 2010).

Rather than a denial of due process, the appellate court found that the student failed to take advantage of the process; the student was provided notice of and the opportunity to be heard at all of the hearings, including the one held on the summary judgment motion, and the student, for whatever reason, simply failed to attend the hearings. Harvey v. Stone County Sch. Dist., 982 So. 2d 463 (Miss. Ct. App. 2008).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived, and the father was not deprived of notice or the ability to prepare. Bailey v. Fischer, 946 So. 2d 404 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

7. Employment and labor relations.

Circuit court erred in dismissing an employee's appeal of a city civil service commission's affirmance of his termination on the ground that pursuant to Miss. Unif. Cir. & Cty. R. 5.05 his, decision to wait forty days before he requested its assistance in compelling the commission to file the transcript exceeded the allowable thirty days because under Miss. R. App. P. 2(a)(2), the employee was entitled to notice from the circuit clerk of the deficiency in his appeal and fourteen days to correct any deficiency, and that lack of notice and opportunity to remedy the deficiency deprived the employee of due process; the circuit court may still dismiss an appeal for which an appellant has failed to timely provide a record, but the Mississippi Rules of Appellate Procedure apply to an appeal to circuit court. Fields v. City of Clarksdale, 27 So. 3d 464 (Miss. Ct. App. 2010).

Employee was not denied due process when he received notice that he was placed on leave but not informed of the type of leave he was placed on or given a formal notice of suspension where the employee was placed on administrative leave with pay pending the resolution of the investigation, and once the investigation was concluded the employee was properly noticed of the employer's intention to terminate his employment. Payne v. Miss. Dep't of Mental Health, 964 So. 2d 582 (Miss. Ct. App. 2007).

8. Judicial proceedings—In general.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art.

3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

In a medical malpractice suit against two doctors, the patient was not denied a fair and impartial trial under Miss. Const. Art. III, § 14 when the trial court properly did not excuse for cause a former patient of one of the doctors who had an unspecified surgical procedure performed 15 years before the lawsuit because the former patient was not biased in favor of the doctor and he swore that his prior experience would not cause him to favor the doctor. Heaney v. Hewes, 8 So. 3d 221 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 206 (Miss. 2009).

11. — — Divorce, alimony, maintenance, and support, judicial proceedings.

While it could not be said that the increase in child support was unreasonable, it was not requested by the father; the chancellor committed error in sua sponte granting an increase in the amount of child support the mother would be required to pay. Purviance v. Burgess, 980 So. 2d 308 (Miss. Ct. App. 2007).

In a divorce case, a former husband's right to due process under Miss. Const. Art. 3, § 14 and the U.S. Constitution were not violated since he was afforded a full, complete, and impartial hearing; the husband called witnesses, was afforded the right to cross-examine, and presented documentary evidence to the chancery court. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

12. — — Child custody, judicial proceedings.

Although the chancellor initially granted the mother's motion to terminate the father's parental rights, the Hinds County Chancery Court did not have proper subject matter jurisdiction to do so because the Scott County Chancery Court entered the initial order of child custody; when presented with information regarding the jurisdictional problem, the chancellor immediately corrected the defect by setting aside his previous orders and instructing that any further proceedings regarding the case be brought before the Scott County Chancery Court, pursuant to Miss. Code Ann. § 93-5-23. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

13. — — Contempt, judicial proceedings.

Defendant's due process rights were not violated by a contempt conviction because a trial court, even though not required for direct contempt, gave defendant notice and conducted a hearing where she was allowed to present evidence. In re Hampton, 919 So. 2d 949 (Miss. 2006), writ of certiorari denied by 547 U.S. 1131, 126 S. Ct. 2042, 164 L. Ed. 2d 784, 2006 U.S. LEXIS 3868, 74 U.S.L.W. 3639 (2006).

14. — — Real property, judicial proceedings.

Chancellor did not err in granting partial summary judgment to the county in dismissing the property owner's claims under Miss. Code Ann. § 19-5-22 and 42 U.S.C.S. § 1983 because the initial requirement for either a procedural or substantive due process claim was proving the plaintiff had been deprived by the government of a liberty or property interest; otherwise, no right to due process could accrue. The property owner failed to prove injury to himself since it was the property owner's tenant, and not the property owner, who the lien was against. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Developer's federal and state due process claims against a city were unripe because the developer had not suffered a deprivation of property; the city had not made a final determination of whether, or under what circumstances, it would issue a building permit to the developer, or whether it would condemn the developer's property. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

18. Crimes and criminal procedure — In general.

19. — — Admissibility of evidence, crimes and criminal procedure.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

20. — — Affidavits or indictments, crimes and criminal procedure.

There was no merit to appellant's assertions that his due process rights were violated when an indictment was amended to reflect his habitual offender status because appellant admitted that he was informed of sentencing recommendations prior to his guilty plea, and appellant was aware early in the proceedings that he was to be charged as an habitual offender. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

Defendant's convictions for the simple assault of a peace officer were appropriate because the trial court did not err in allowing an amendment to his indictments on the morning of trial since the deleted phrase was merely a scrivener's error and had nothing to do with the charge. The provision was not substantive to the underlying charge of assaulting the officers with punches, kicks, and threats. Graham v. State, 967 So. 2d 670 (Miss. Ct. App. 2007).

21. — — Assistance of counsel, crimes and criminal procedure.

In a child custody case, even though due process entitled a mother to counsel during criminal contempt proceedings, there was no violation of the right to counsel under U.S. Const. Amend. VI where the mother had failed to secure counsel, despite being given 6 months to do so. Davis v. Davis, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

Defendant's murder conviction was appropriate where her due process rights were not violated because the record was devoid of any evidence or proof as to precisely how additional time by way of a continuance would have assisted counsel. Lyle v. State, 908 So. 2d 189 (Miss. Ct. App. 2005).

24. — — Confessions, crimes and criminal procedure.

Because defendants entered voluntary and intelligent guilty pleas to armed robbery, they waived the right to challenge the voluntariness of their confessions to such under the U.S. Constitution and Miss. Const. Art. 3, §§ 14 and 26; therefore, their motions for post-conviction relief were denied. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

State presented ample evidence that the statement made by defendant at booking, and before he was read his Miranda rights, was voluntary and was not in response to express questioning or its functional equivalent. Defendant was simply present in the booking room when two officers were having a discussion about paperwork in order to book him, and defendant voluntarily responded to a question that was posed to one officer by the

other officer, of how many charges of homicide were being filed against defendant; defendant independently volunteered the information that he had only shot one person, without compulsion or coercion. Hammons v. State, 918 So. 2d 62 (Miss. 2005).

24.5. — — Contempt, crimes and criminal procedure.

In a child custody case, a mother was provided her procedural due process rights with regards to a finding of constructive criminal contempt because the charges were specific, the mother was provided with notice, and she was afforded the opportunity to be heard. Davis v. Davis, 17 So. 3d 114 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

25. — — Cross examination, crimes and criminal procedure.

In defendant's criminal prosecution for murder and attempted arson, the State did not dilute defendant's rights of confrontation and cross-examination under Miss. Const. Art. III, §§ 14, 26 by cross-examining and redirecting its witnesses. The State was permitted to redirect a witness about her statement where defense counsel placed the statement at issue by introducing it into evidence on cross-examination; the State was permitted to ask its witness leading questions about the statement. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

26. — — Disclosure of evidence, crimes and criminal procedure.

Defense counsel was given every opportunity to listen to the tapes and view the transcripts, as all evidence was made available to defense counsel, and no evidence was intentionally withheld by the State; additionally, when applying the four-part test to determine if Brady violations occurred in the inmate's case with respect to two witnesses, the trial court finding on that issue was supported by the record. Therefore, all exculpatory issues raised by the inmate regarding those two witnesses were without merit, and there was no violation of defendant's due process rights. Manning v. State, 929 So. 2d 885 (Miss. 2006).

Where defendant claimed the prosecution suppressed a statement made by a witness to the police on the night of the murder, the court found no Brady violation. Defendant made no showing that the contents of such a statement would have been exculpatory, and defendant had the opportunity at trial to call the witness and examine him thoroughly. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

27. — — Disqualification of judge, crimes and criminal procedure.

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, these functions were inherently contradictory — zealous advocate versus neutral adjudicator. Appellant's right to due process was violated by the judge's failure to recuse himself. Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).

28. — — Jury trial, crimes and criminal procedure.

If exercising ten of 11 peremptory challenges against African-American members of a venire did not suffice as a prima facie case of purposeful discrimination when one-third of the panel was African-American, then it was difficult to imagine what would; therefore, in a robbery case, the state should have been ordered to provide race-neutral reasons for its use of peremptory challenges because a prima facie case was shown by defendant. Scott v. State, 981 So. 2d 979 (Miss. Ct. App. 2007), reversed by 981 So. 2d 964, 2008 Miss. LEXIS 230 (Miss. 2008).

Although defendant's rights under the Equal Protection Clause were violated by the state's striking of one male juror, a court of appeals erred by reversing armed robbery convictions under the plain error standard of review because there was no prejudice to the outcome of the trial since the jury was substantially gender-neutral. McGee v. State, — So. 2d —, 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006), opinion withdrawn by, substituted opinion at, affirmed by, remanded by 953 So. 2d 211, 2007 Miss. LEXIS 19 (Miss. 2007).

29. — — Examination and qualification of jurors, crimes and criminal procedure.

In defendant's murder case, the State's proferred reasons for striking a juror were race neutral because the State's reason for striking the juror was that the prosecutor once had a contentious civil matter involving members of the juror's family. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In defendant's murder case, the State's proferred reasons for striking a juror were race neutral because, although mistaken, the State believe that the juror had been convicted of four misdemeanors. The juror had actually only been charged with the crimes, not convicted. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

30. — — Fair trial, crimes and criminal procedure.

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's right to a fair trial was preserved. Welde v. State, 3 So. 3d 113 (Miss. 2009).

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

Where no errors raised warranted granting post-conviction relief, defendant was not deprived of a fair trial due to the cumulative effect of the alleged errors. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

DNA testing of the knife used in an assault would have been of little assistance to defendant and therefore was not necessary to preserve defendant's due process guarantees as both the victim and the eyewitness testified that defendant attacked the victim, and if the blood on the knife was found to be defendant's blood, it would have added little support to his theory of self-defense; thus, defendant was not denied a fair trial nor was his request for expert assistance necessary to preserve his due process guarantees. Grubbs v. State, 956 So. 2d 932 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 313 (Miss. 2007).

Defendant's right to a fair trial was not violated where defendant could not show that a discovery violation was committed by the State or that he was prejudiced in any way when there was nothing in the record showing knowledge on the part of the State of either of the two defense witnesses, and defendant made no showing how the police could have known of them and thus failed to disclose them; even though defendant claimed prejudice because police and/or the DA's office failed to find certain witnesses who would have helped him in his defense, he put on no proof at trial of an alleged inadequate investigation. Morris v. State, 927 So. 2d 744 (Miss. 2006).

Defendant was properly denied post-conviction relief after he pled guilty to armed robbery because the trial court did not err in not disqualifying the assistant district attorney on the ground that he had served as defendant's court-appointed attorney prior to serving as assistant district attorney. Confidential information was not used in the prosecution of the case, and defendant was not denied fair trial. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

32. — — Guilty pleas, crimes and criminal procedure.

Nothing in the record showed that an inmate's guilty plea was not entered knowingly and voluntarily, given that he was asked about his education, whether he had reviewed the plea petitions, and whether he understood them and that he was waiving certain rights, plus the inmate stated that he understood the charges, the consequences of pleading guilty, and that he was entering his plea voluntarily. Gaddy v. State, 21 So. 3d 677

(Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Because appellant inmate did not raise an issue relating to an alleged due process violation based on the lack of a court reporter in a motion for post-conviction relief, the issue was procedurally barred; at any rate, there was a court reporter present at the inmate's plea colloquy hearing. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

Because defendant was not informed of the elements of the charge as to his guilty plea, the appellate court reversed and remanded for a hearing as to whether defendant had the elements explained to him prior to pleading guilty, and whether there was a factual basis for the plea. Jones v. State, 936 So. 2d 993 (Miss. Ct. App. 2006).

Record indicated that the trial court, at sentencing, had some evidence that defendant committed the offense, and whether such evidence was substantial was difficult to ascertain; there was some question whether the plea following the second colloquy was knowing, intelligent and voluntary, and the supreme court could see additional facts which raised doubt as to the voluntariness of her plea. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because his guilty plea was voluntary; defendant stated in his petition to enter a plea of guilty that he was entering the plea freely, voluntarily, and of his own accord, with full understanding of all matters set forth in the indictment. Defendant also acknowledged in the petition that he could receive a sentence of zero to 60 years if convicted for the sale of cocaine as an enhanced offender, and that by pleading guilty he could receive a sentence of zero to 30 years. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Defendant entered a valid guilty plea where he waived his right to a trial and the trial court questioned defendant to determine that the entry of the guilty plea was knowingly and voluntarily given; defendant was competent and understood the plea agreement he had signed, and defendant understood that the trial court could impose a sentence anywhere from the minimum to the maximum. Greer v. State, 920 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari dismissed by 933 So. 2d 303, 2006 Miss. LEXIS 307 (Miss. 2006).

33. — — Identification of defendant, crimes and criminal procedure.

Trial court did not err in admitting the victim's in-court identification of defendant because there was substantial credible evidence supporting the trial court's findings that the in-court identification testimony was not impermissibly tainted by her pre-trial identification of him and the in-court identification was sufficiently reliable to comport with the requirements of due process since, inter alia: (1) the

victim had ample opportunity to view defendant at the time of the attempted crime; (2) the victim's attention was entirely directed at viewing defendant as he tried to hide behind a tree, located approximately three feet from her bedroom window in her backyard; and (3) the victim's description of defendant in her conversation with the police dispatcher was sufficiently accurate. Brown v. State, 961 So. 2d 720 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant's due process rights were violated by the use of a single set of dental molds in a murder case was procedurally barred since the issue was capable of being raised at trial or on direct appeal; even if it was not, identification of defendant by an eyewitness was distinguishable from an expert's conclusion that defendant inflicted a particular injury based on scientific analysis. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Where witnesses at defendant's trial identified him in court as the person who shot the victim, he failed to preserve his due process claim. Defendant did not have other persons with him at counsel's table and he failed to request a pre-trial identification. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

35. — — Instructions, crimes and criminal procedure.

In a carjacking case, even though an indictment and a jury instruction lacked the specific language "from another person's immediate actual possession," as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. Perryman v. State, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Defendant's convictions for the simple assault of a peace officer were appropriate because even though a jury instruction erroneously allowed the jury to find "physical menace" from words alone, it was a harmless error since it was uncontradicted that defendant attacked the officers with kicks and punches. Graham v. State, 967 So. 2d 670 (Miss. Ct. App. 2007).

38. — — Production of evidence and witnesses, crimes and criminal procedure.

In a statutory rape case, a trial court did not abuse its discretion by refusing to appoint an expert where defendant did not show that it would have aided his defense that semen had been planted in the victim's vagina; defendant did not want an expert to testify at trial, but only requested assistance with cross-examination. Since he was able to conduct such without the aid of an expert, there was no due process violation. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

Amount of force required to overtake another person's will to resist is directly proportional to the development of the other's will; therefore, defendant was properly convicted of kidnapping a child where he used deceit to lure him into a vehicle because the state proved all of the elements of kidnapping, as required by due process. Potts v. State, 955 So. 2d 913 (Miss. Ct. App. 2007).

39. — — Sentence and punishment, crimes and criminal procedure.

Post-conviction relief was denied in a case where appellant inmate contended that he was denied due process when he received a 30-year sentence after pleading guilty to three counts of armed robbery. The inmate's claim of being a first-time

offender was completely devoid of merit as he admitted to previous convictions of possession of stolen property and burglary of a vehicle. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Defendant's post-conviction motion was properly dismissed because while defendant retained the ability to challenge the legality of the incarceration, despite entering into an agreed sentencing order whereby defendant agreed not to file an appeal or a motion for postconviction collateral relief, nothing in the record showed that defendant was illegally confined. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Defendant's due process rights were not violated in a drug case where he was not provided a separate recidivism hearing since he was not entitled to such, defendant acknowledged that he was indicted as a habitual offender and that the maximum punishment was life, and he also admitted that he was previously convicted of several felonies; defendant was unable to complain about the sentence since he was the beneficiary of a lenient sentence where he was given 17-years, despite being a habitual offender. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Defendant's motion for post-conviction relief was properly denied because his sentence was not unconstitutionally vague and subject to more than one interpretation; he was sentenced to 18 years in prison with 12 years to serve, and 18 minus 12 left six years suspended, which is what the language in the sentencing order reflected. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant's sentence of two days in jail for driving under the influence and failing to dim his headlights was upheld where there was no absolute constitutional bar to sentence enhancement at a second trial; an on-the-record explanation of an enhanced sentence was not warranted after a trial de novo in a superior court following an appeal from an inferior court. Carr v. State, 942 So. 2d 816 (Miss. Ct. App. 2006).

There was no equal protection violation when appellant received a 15-year sentence for statutory rape; appellant conceded that the statute applied equally to male and female defendants. McKenzie v. State, 946 So. 2d 392 (Miss. Ct. App. 2006).

In a sexual battery case, Miss. Code Ann. § 97-3-101(3) authorizes the maximum sentence to be life in prison, but does not require the jury to arrive at that verdict. Because the trial court acted within the limits of the statute and the statute did not require a finding by the jury, the procedure used by the trial court did not violate his due process rights because it did not fail to take into consideration certain factors in determining a proper sentence. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Court found no merit to defendant's claim that his due process rights were violated when the trial judge failed to honor his plea agreement because the trial judge clearly informed defendant that the recommended sentence was going to be limited to the current charge. The trial judge stated that he would not take any other charges into consideration when sentencing defendant. Black v. State, 919 So. 2d 1017 (Miss. Ct. App. 2005).

41. — — Vague or indefinite statutes, crimes and criminal procedure.

Business owner did not meet his burden of showing that he was being deprived of his property without due process of law because the criminal statutes, Miss. Code Ann. § 97-33-7 and Miss. Code Ann. § 97-33-17, were not too broad in their description of what caused a video game to be an illegal slot machine, and a person with ordinary intelligence would have little difficulty determining what exactly was prohibited; Mississippi did not extend a property right to illegal gambling machines, such that there were no due process rights violations, and Miss. Code Ann. § 97-33-7(2) was not unconstitutionally vague. Trainer v. State, 930 So. 2d 373 (Miss. 2006).

42. Prisons and prisoners—In general.

45. — — Parole, prisons and prisoners.

Inmate's due-process rights were not violated when his parole was revoked because upon receiving a certified copy of the order of the court of appeals, the parole board had authority pursuant to Miss. Code Ann. 47-7-27 to immediately revoke the inmate's parole on his earlier conviction; a preliminary revocation hearing and a parole-revocation hearing were held, and the parole board then sent the inmate a letter, which provided notice of its decision to revoke his parole and afforded an opportunity to present evidence on his behalf. Walker v. State, 35 So. 3d 555 (Miss. Ct. App. 2010).

46. — — Probation, prisons and prisoners.

Denial of the inmate's motion for post-conviction relief was appropriate because his due process rights were not violated by the failure to appoint counsel for him at his probation revocation hearing. The issues relevant to his probation revocation were not complex nor were they difficult to present; thus, the inmate had no right to counsel. Staten v. State, 967 So. 2d 678 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 294 (Miss. 2008).

Denial of the inmate's petition for post-conviction relief was proper where his due process rights were not violated by the reference to a probation violation with which he was not charged because the revocation of his probation was clearly based upon a finding that he had failed to avoid persons or places of disreputable or harmful character by remaining in a place where marijuana was being used. Hubbard v. State, 919 So. 2d 1022 (Miss. Ct. App. 2005).

53. Racial discrimination.

Peremptory strike was not race-neutral because, in requesting the strike, counsel argued that he wished to strike the juror because she was Baptist; however, counsel did not strike another juror who was also Baptist and white, and the juror was not questioned about her religion and whether that would impair her ability to be an impartial juror. Wilson v. Strickland, 953 So. 2d 306 (Miss. Ct. App. 2007).

55. Use of property—In general.

56. — — Zoning laws, use of property.

Where the building inspector granted the ice company permits for an ice dispenser, the city's action in applying for a variance and overturning the decision to grant the permit were arbitrary and capricious and violated the company's due process rights under the United States Constitution and the Mississippi Constitution. No notice of the hearing was given to the company. City of Petal v. Dixie Peanut Co., 994 So. 2d 835 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 683 (Miss. 2008).

56.5. Eminent domain.

Owner/developer of a rundown apartment complex did not suffer violations of its right to due process because the owner/developer did not have property interests via contractual rights in the Moderate Rehabilitation Contract or the Annual Contribution Contract at issue and therefore could not have been deprived of the contracts without due process. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

60. Regulation of business and professions — In general.

In a case involving a certificate of need, procedural due process rights were not

violated where all of the steps under Miss. Code Ann. § 41-7-197 were followed; no parties to the proceeding, no health care facilities in the same health care service area, and no others originally noticed, appeared to request a new hearing. The issue of import to satisfy the requirements of the Mississippi State Health Plan was not the specific route, but rather the number of procedures, and notice of a new route was given. Miss. State Dep't of Health v. Baptist Mem. Hospital-DeSoto, Inc., 984 So. 2d 967 (Miss. 2008).

Massage therapist's due process rights were not violated when a Mississippi State Board of Massage Therapy member investigated the client's complaint against the therapist and later participated in the administrative hearing because the Board member's dual capacity as investigator and hearing participant was procedurally correct. Dawson v. Miss. State Bd. of Massage Therapy, 949 So. 2d 829 (Miss. Ct. App. 2006).

Trial court erred in overturning a board's denial of an application for a funeral service license where the applicant stated that he planned to do his training in Mississippi, but actually worked in Tennessee; at the board's hearing, the applicant was allowed to present witnesses and other forms of evidence, and his due process concerns were adequately addressed. Miss. State Bd. of Funeral Servs. v. Coleman, 944 So. 2d 92 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 730 (Miss. 2006).

66. — — Physicians, regulation of business and professions.

Physician, who was licensed and occasionally practiced medicine in Mississippi, and a medical clinic, which had an office and rented timeshare office space in Mississippi, subjected themselves to suit under the clear terms of the long-arm statute, Miss. Code Ann. § 13-3-57, by doing business in the state. Considering the interests of Mississippi in providing a forum for legal redress for residents who were negligently injured by out-of-state physicians, the court found that the circuit court's assumption of personal jurisdiction over the physician comported with traditional notions of fair play and substantial justice and did not offend U.S. Const. Amend. XIV. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

73. Workers compensation.

Award of workers' compensation benefits to an employee was overturned where, as a result of the Mississippi Workers' Compensation Commission's departure from its own procedural rules, certain medical records were entered into evidence that erroneously provided medical causation relating the employee's focal dystonia to the employee's work as a card dealer for the employer; the mandates of due process were not adhered to by the commission. Robinson Prop. Group v. Newton, 975 So. 2d 256 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 284 (Miss. 2008).

76. Education, schools and students.

Student's due process rights were not violated where he was not afforded notice and an opportunity to be heard at a school board meeting regarding his alleged violation of the school district's weapons policy because the student was afforded notice and an opportunity to be heard before the Appeals Committee. Due process did not require that defendant be afforded with an opportunity to be heard at every step of the student disciplinary process. Hinds County Sch. Dist. Bd. v. R.B., 10 So. 3d 387 (Miss. 2008).

Student was denied his due process rights during disciplinary proceedings against him where not only was the student not allowed to pose questions to the other students involved in the incident, who were not present at the hearing, he had no right to even know the names of the students who accused him; the student received absolutely no notice of the hearing in which the school district was to review the Appeals Committee's recommendation of expulsion for one year and render a final decision on the disciplinary proceeding, and a one-year expulsion required more than the minimal due process protections of notice and right to be heard. Hinds County Sch. Dist. Bd. of Trs. v. R.B., 10 So. 3d 495 (Miss. Ct. App. 2007), reversed by 10 So. 3d 387, 2008 Miss. LEXIS 606 (Miss. 2008).

Superintendent's due process argument was rejected in a case arising from his dismissal because he was not required to get the notice set forth in Miss. Code Ann. § 37-9-109, which covered nonrenewals, and a school district board complied with the procedures set forth in Miss. Code Ann. § 37-9-59 and Miss. Code Ann. § 37-9-111; moreover, even if § 37-9-109 did apply to the case, the superintendent failed to avail himself of the requirements of such. Wilder v. Bd. of Trs. of the Hazlehurst City Sch. Dist., 969 So. 2d 83 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 657 (Miss. 2007).

79. Miscellaneous.

There was no due process violation with respect to doctors on the Mississippi Public Employees' Retirement System Medical Board examining claimants, making a diagnosis and recommendation, and then voting as members of the Medical Board on the disability claims; therefore, the denial of a disability claim was upheld. Flowers v. Public Emples. Ret. Sys., — So. 2d —, 2006 Miss. App. LEXIS 247 (Miss. Ct. App. Apr. 4, 2006), opinion withdrawn by, substituted opinion at 952 So. 2d 972, 2006 Miss. App. LEXIS 778 (Miss. Ct. App. 2006).

Arrestee's due process rights were not violated by an assistant district attorney's act of providing incorrect identifying information to police that led to a wrongful arrest in a false pretenses case because the overall actions were objectively reasonable, even though a picture of the correct perpetrator and a discrepancy regarding birth dates was contained in a file; as such, the assistant district attorney was entitled to qualified immunity. Stewart v. DA, 923 So. 2d 1017 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

RESEARCH REFERENCES

ALR. Failure of state prosecutor to disclose existence of plea bargain or other deals with witness as violating due process. 12 A.L.R.6th 267.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas - Coercion or Duress. 19 A.L.R.6th 411.

Failure of State Prosecutor to Disclose Exculpatory Tape Recorded Evidence as Violating Due Process. 24 A.L.R.6th 1.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of *Miranda v. Arizona* Requiring That Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation - Suspect Injured or Taken Ill. 25 A.L.R.6th 379.

What Constitutes 'Custodial Interrogation' of Juvenile by Police Officer Within Rule of *Miranda v. Arizona* Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation - At Police Station or Sheriff's Office. 26 A.L.R.6th 451.

When Does Use of Taser Constitute Violation of Constitutional Rights. 45 A.L.R.6th 1.

§ 15. Slavery and involuntary servitude prohibited; punishment for crime.

JUDICIAL DECISIONS

1. In general.

Mother's assertions were without merit that by attempting to force her into the foster care system with her newborn, and by threatening to withhold contact with the child, the Department of Human Services subjected her to unconstitutional involuntary servitude in violation Miss. Const. Art. III, § 15 and U.S. Const. Amend. XIII; in every case in which the supreme court found a condition of involuntary servitude, the victim had no avail-

able choice but to work or be subject to legal sanction. In the Interest of C.B.Y., 936 So. 2d 974 (Miss. Ct. App. 2006).

§ 16. Ex post facto laws; impairment of contract.

JUDICIAL DECISIONS

4. Ex post facto laws—In general.

5. — — Death penalty cases, ex post facto laws.

Circuit court did not err in resentencing defendant to serve a sentence of life without the possibility of parole pursuant to Miss. Code Ann. § 99-19-107 after vacating his death sentence because it correctly applied § 99-19-107 in resentencing defendant, and since defendant's death penalty was found unconstitutional by the United States Supreme Court's ruling in Atkins, the application of § 99-19-107 was appropriate; the statute clearly states that no one whose death penalty was ruled unconstitutional can receive life with parole, and the application of the statute in no way constitutes an ex post facto punishment in violation of Miss. Const. art. 3, § 16 and U.S. Const. art. I, § 10. Neal v. State, 27 So. 3d 460 (Miss. Ct. App. 2009).

Appellant's motion for post-conviction relief was properly denied as untimely filed because appellant's sentence of life without parole, under Miss. Code Ann. § 97-3-21, following his plea of guilty to capital murder, did not violate his constitutional right against ex post facto application of the law because (1) the Supreme Court of Mississippi previously held that the imposition of the new sentencing option of life without parole did not violate the prohibition against ex post facto laws, and (2) sentencing under Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pretrial, trial, or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. Randall v. State, 987 So. 2d 453 (Miss. Ct. App. 2008).

After the supreme court remanded defendant's matter for resentencing and the circuit court resentenced defendant to life imprisonment without the possibility of parole, defendant challenged the applicability of Miss. Code Ann. § 99-19-107; however, defendant's challenge was procedurally barred because defendant failed to raise the issue before the matter was remanded, and further, application of that statute as opposed to Miss. Code Ann. § 97-3-21, which was in effect at the time of the commission of the offense, did not violate ex post facto provisions. Foster v. State, 961 So. 2d 670 (Miss. 2007).

6. — — Drugs and alcohol, ex post facto laws.

Trial court erred in summarily dismissing an inmate's petition seeking trusty status; since the record lacked sufficient factual findings to determine whether the application of Miss. Code Ann. § 47-5-138.1 to the inmate constituted an ex post facto violation, resolution of this issue required an evidentiary hearing. Horton v. Epps, 20 So. 3d 24 (Miss. Ct. App. 2009).

The amendment to Miss. Code Ann. § 47-5-138.1 was not an ex post facto law; even though the amended statute held that an offender was not eligible for trusty status if the offender was convicted of trafficking in controlled substances, defendant continued to receive the 10 days for 30 days time benefit under the prior

statute. Ross v. Epps, 922 So. 2d 847 (Miss. Ct. App. 2006).

8.5 — Aggravated assault, ex post facto laws.

Defendant's enhanced sentences for his convictions of aggravated assault on law enforcement officers were inappropriate because he should have been sentenced under Miss. Code Ann. § 97-37-37(1), which became effective on July 1, 2004, and which was in effect at the time his crime was committed. Instead, he was sentenced under Miss. Code Ann. § 97-37-37(2), which was not in effect at the time his crime was committed. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

9. — — Probation or parole, ex post facto laws.

Trial court did not err in upholding the decision of the Mississippi Department of Corrections (MDOC) to deny an inmate trusty status because the MDOC, pursuant to Miss. Code Ann. § 47-7-3(2), stopped applying trusty time to reduce an offender's parole eligibility date, and the MDOC's decision to change its application of the trusty-time policy was not an ex post facto application of the law as to defendant; therefore, the inmate's placement into trusty status would not reduce the amount of time that he had to serve before becoming eligible for parole on his kidnaping conviction. Rice v. State, 28 So. 3d 683 (Miss. Ct. App. 2010).

12. Contracts within constitutional protection — In general.

Miss. Const. Art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1 were violated when a decision was retroactively applied to releases executed in a personal injury case; the law in effect at the time the releases were executed stated that the release of an agent had no effect on a principal's vicarious liability. The validity and obligation of a contract could not have been impaired by a court decision altering the construction of the law. Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009).

Contracts clause of the Mississippi Constitution, Miss. Const. Art. III, § 16, prohibited the retroactive application of precedent that limited an employer's vicarious liability for the negligence of its employee because the rights of an injured party could not be impaired by a subsequent judicial decision altering the construction of the law. Dimple v. T & M Foods, Ltd., — So. 2d —, 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), substituted opinion at 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009).

16. Impairment of obligation of contract—In general.

Couple did not rely on any statutory authority when they entered into the contract with the driver's insurer but instead they entered into the contract based upon prior judicial decisions regarding the release of a tortfeasor in a vicarious liability situation; thus, the contracts clause of Miss. Const. art. 3, § 16 was not applicable. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946 (Miss. Ct. App. 2007), reversed by, remanded by 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), reversed by, remanded by 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009)supra.

§ 17. Taking property for public use; due compensation.

JUDICIAL DECISIONS

1. In general.
2. Validity of statutes—In general.
7. Right of eminent domain—In general.
17. Right to due compensation—In general.
22. — — Construction and use of streets and highways, right to due compensation.
26. Measure of compensation or damages, right to due compensation.
27. — — Burden of proof, right to due compensation.
28. Actions and remedies—In general.
29. — — Actions by or against political subdivisions, actions and remedies.

1. In general.

Where the allegations by a farm against the Mississippi Transporation Commission for flooding of the farm's property had sounded in negligence, the farm could not assert Miss. Const. Art. 3, § 17 for the first time in its response to the Commission's summary judgment motion as a defense, because the MTC did not have sufficient notice of the taking claim for the farm's response to the summary judgment motion. B & W Farms v. Miss. Transp.Comm'n, 922 So. 2d 857 (Miss. Ct. App. 2006).

2. Validity of statutes—In general.

District court found that the Eleventh Amendment to the U.S. Constitution did not bar an association from proceeding with an action against Mississippi's Fiscal Officer in his official capacity, alleging that powers he was given under amendments to Miss. Code Ann. § 83-21-21 violated the Fifth and Fourteenth Amendments to the U.S. Constitution because he was able to take private property without just compensation, but that it could not hear claims the association made against the State of Mississippi or a claim it made against the Fiscal Officer which alleged that the amendments violated Miss. Const. art. 3, § 17. Miss. Surplus Lines Ass'n v. Mississippi, 384 F. Supp. 2d 982 (S.D. Miss. 2005).

7. Right of eminent domain—In general.

Plaintiff landowner, whose dilapidated structure was demolished by defendant city on public safety grounds, was given sufficient notice and time to clean the property himself; due to the fact that he did not comply with the city's directives within the time given, the city was authorized to clear his property and assess the costs to him without that constituting a taking under the Mississippi Constitution. Pearson v. City of Louisville, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Judgment for eminent domain taking under Miss. Const. Art. 3 § 17 was affirmed because the evidence was sufficient to support the verdict; there was reasonable access left to the property after the taking; the jury awarded the landowner several thousand dollars more than the original offer, indicating the jury awarded some damages for the lack of access; and there was no problem with the jury instructions as they provided a correct statement of the statutory procedure involved in eminent domain. North Biloxi Dev. Co., L.L.C. v. Miss. Transp. Comm'n, 912 So. 2d 1118 (Miss. Ct. App. 2005).

17. Right to due compensation—In general.

22. — — Construction and use of streets and highways, right to due compensation.

In a case where a city widened ditches on the owner's property, a chancery court failed to determine if this exceeded the scope of the city's prescriptive easement. If, on remand, the chancellor found that the city exceeded the scope of its easement by widening the ditch, the owner would have at least been entitled to damages for the physical occupation of his property, even if the chancellor found no damages to the remainder. Fratesi v. City of Indianola, 972 So. 2d 38 (Miss. Ct. App. 2008).

26. Measure of compensation or damages, right to due compensation.

Landowner's expert appraiser's opinion as to the diminution in value of the remainder of the landowner's property occasioned by the taking of an easement for a pipeline should have been excluded under Miss. R. Evid. 702 because he failed to offer admissible market-data or comparable-sales evidence. Gulf S. Pipeline Co., LP v. Pitre, 35 So. 3d 494 (Miss. 2010).

27. — — Burden of proof, right to due compensation.

Because an expert in an eminent domain action had little or no knowledge as to the valuation of a business sign based on the cost approach, his testimony based on a quote from a sign company should have been stricken since he was merely acting as a conduit for hearsay about another expert's opinion, in violation of Miss. R. Evid. 703; however, additur was not an appropriate remedy in this case because the jury verdict was based on inadmissible evidence. Martin v. Miss.

Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

Additur was not appropriate in an eminent domain case because the damages awarded to two land owners were not contrary to the overwhelming weight of the evidence; the admissibility of an expert's opinion regarding the value of the land was waived, so the jury properly took into account the valuation evidence presented by both parties in making its decision. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

28. Actions and remedies—In general.

Suit against the state transportation commission, alleging a taking without just compensation in violation of Miss. Const. Art. 3, § 17, need not have been brought under the Mississippi Tort Claims Act, and thus was not time-barred under Miss. Code Ann. § 11-46-11(3), because the constitutional provision was self-executing. McLemore v. Miss. Transp. Comm'n, 992 So. 2d 1107 (Miss. 2008).

29. — —Actions by or against political subdivisions, actions and remedies.

Developer's regulatory takings claim, that a city erroneously applied an otherwise valid flood plain ordinance, was unripe for review because, when the developer was notified that Moderate Rehabilitation program contracts related to an apartment complex the developer owned would not be renewed, it suspended plans to rehabilitate the complex and abandoned all avenues of review that were available to it; consequently, the court was unable to evaluate the extent to which the city interfered with the developer's reasonable investment-backed expectations because no final decision had been made, nor even sought, regarding the application of the flood-zone ordinance. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

To the extent that a developer alleged an ordinary takings claim against a city, such claim was unripe because the city had not made a final decision on whether to condemn the developer's property, and had done nothing more than state its intent to proceed with condemnation. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

Regional housing authority, in distributing alternative housing vouchers to the tenants of a flooded apartment complex, did not effect a taking under Mississippi law because the housing authority did not force the tenants to abandon their leases or interfere with the owner/developer's reasonable investment-backed expectations since the tenants were simply given an option to either accept the voucher and use it elsewhere, or to decline the voucher and remain under their leases at the apartment complex. Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006).

RESEARCH REFERENCES

ALR. Application of Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), to "Public Use" Restrictions in Federal and State Constitutions Takings Clauses and Eminent Domain Statutes. 21 A.L.R.6th 261.

§ 18. Freedom of religion.

RESEARCH REFERENCES

ALR. Landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs. 10 A.L.R.6th 513.

Wearing of Religious Symbols in Courtroom as Protected by First Amendment. 18 A.L.R.6th 775.

State Constitutional Challenges to the Display of Religious Symbols on Public Property. 26 A.L.R. 6th 145.

Constitutionality of Legislative Prayer Practices. 30 A.L.R.6th 459.

§ 21. Writ of habeas corpus.

JUDICIAL DECISIONS

2. Habeas corpus applications within section.

Petitioner was not denied his right to a writ of habeas corpus when his notice of appeal in writ of state habeas corpus was denied as a successive writ; the Mississippi Legislature had enacted a comprehensive procedure for postconviction relief through the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-3(1). Austin v. State, 914 So. 2d 1281 (Miss. Ct. App. 2005).

§ 22. Double jeopardy.

JUDICIAL DECISIONS

1. In general.
2. When jeopardy attaches—In general.
3. — — Judgments and judicial proceedings generally, when jeopardy attaches.
5. — — Dismissal or nolle prosequi, when jeopardy attaches.
6. — — Mistrial, when jeopardy attaches.
7. — — Plea agreements, when jeopardy attaches.
10. — — Revocation of parole or probation, when jeopardy attaches.
13. Identity of offenses—In general.
15. Sentence and punishment—In general.
15.5. Addition of a condition to a suspended sentence.
16. — — Guilty pleas, sentence and punishment.
18. — — Parole, probation, or suspended sentence, sentence and punishment.
21. Different elements, no double jeopardy.

1. In general.

In a case in which defendant appealed the dismissal of his motion for post-conviction relief, he argued unsuccessfully that he was subjected to double jeopardy because he was charged with armed robbery on three occasions: (1) in Count II of his indictment, (2) in Count IV of his indictment, and (3) when he pled guilty to the charge of armed robbery. The State filed an Order of Nolle Prosequi on Counts I, II, III, and V; therefore, the burglary charge in Count II was passed to the file, and defendant was no longer charged with nor convicted of Count II. Ewing v. State, 34 So. 3d 612 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 245 (Miss. 2010).

Denial of the inmate's petition for post-conviction relief was appropriate where he was not permitted to address a double jeopardy claim for the first time in a postconviction relief motion. Hoskins v. State, 934 So. 2d 326 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's motion for post-conviction relief because the inmate was not subjected to double jeopardy for the separate convictions of conspiracy to commit capital murder and attempted capital murder as they are two separate crimes. Lee v. State, 918 So. 2d 87 (Miss. Ct. App. 2006).

2. When jeopardy attaches—In general.

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, his double jeopardy rights were not violated due to the fact that some of the elements of the crimes overlapped; each of the crimes involved required proof of an additional fact that the other did not. McCollins v. State, 952 So. 2d 305 (Miss. Ct. App. 2007).

3. — — Judgments and judicial proceedings generally, when jeopardy attaches.

Jeopardy had not attached when the municipal court dismissed defendant's

driving under the influence (DUI) charge in the municipal court, where the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Moreover, the judge's comments on the order relative to the DUI charge did not contain any findings of the court, but rather, the court merely recorded the reasons that the prosecutor gave for not proceeding to trial on the DUI charge; such notations in the order did not constitute either an acquittal or an adjudication, such that the subsequent indictment or trial of defendant would be barred by the Double Jeopardy Clause, U.S. Const. amend. V, Miss. Const. art. 3, § 22. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

5. — — Dismissal or nolle prosequi, when jeopardy attaches.

In a 28 U.S.C.S. § 2254 case, a pro se state inmate unsuccessfully argued that the initial indictment had to have been nolle prosequied before a second indictment could be issued in order for a second indictment to not place him in double jeopardy. Since he was only tried on the second and superseding indictment, double jeopardy was not implicated in the case. Eason v. King, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 79238 (S.D. Miss. Aug. 4, 2010).

6. — — Mistrial, when jeopardy attaches.

Trial court did not err in failing to dismiss an indictment on the basis of double jeopardy because the prosecution had not deliberately provoked a mistrial by failing to disclose to defendant prior to trial that an officer would testify that defendant had surrendered defendant's driver's license prior to running from officers. Daniels v. State, 9 So. 3d 1194 (Miss. Ct. App. 2009).

7. — — Plea agreements, when jeopardy attaches.

Defendant's voluntary refusal to testify against his co-defendant constituted a material breach of his plea bargain agreement with the State, and, as a result of his breach, the parties were returned to the status quo ante; thus, defendant had no double jeopardy defense available concerning re-indictment and conviction on the charges. Also, the transcript of defendant's guilty plea hearing clearly showed that he was aware that the State would seek to invalidate his plea and reinstate the charges if he failed to testify truthfully against his co-defendant; additionally, as to the reinstatement of a kidnapping charge, it was fully within the State's authority to re-indict defendant for the same offense after an order of nolle prosequi had been entered. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

10. — — Revocation of parole or probation, when jeopardy attaches.

Reinstatement of defendant's suspended sentence did not constitute double jeopardy because the trial court did not attempt to impose a greater sentence than that already levied on defendant. Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Protection guaranteed by the Double Jeopardy Clauses of the Fifth Amendment and Miss. Const. Art. 3, § 22, and the doctrine of collateral estoppel, did not preclude the State from charging defendant with a cocaine offense that was the basis for an unsuccessful petition to revoke his probation, because there were different issues and burdens of proof involved in a revocation hearing and a trial on the indictment. A revocation hearing is conducted to enforce the court's order imposing conditions on a defendant under a suspended sentence, and the issue to be determined at trial on the indictment is whether the State has proven beyond a reasonable doubt the elements of the charge; therefore, collateral estoppel does not apply. Oliver v. State, 922 So. 2d 36 (Miss. Ct. App. 2006).

13. Identity of offenses—In general.

Defendant's double jeopardy rights were not violated by her convictions for

three counts of driving under the influence and negligently causing death because the State was not required to specifically list the substance or substances that defendant allegedly was driving under the influence of at the time of the accident. Defendant was only convicted of one count of driving under the influence of hydrocodone and negligently causing the death or injury of another for each death or injury so caused. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant argued that the jury's verdict of not guilty to the charge of capital murder also acquitted her of any underlying and lesser-included offenses, and that she should have been discharged as a matter of law and pursuant to the prohibition against double jeopardy; however, Miss. Code Ann. § 99-19-5(1) allowed a jury to find a defendant guilty of inferior offenses, the commission of which was necessarily included in the offense with which defendant was charged. Because murder was a lesser-included offense of capital murder, the trial court did not err in accepting a verdict of guilty of murder and defendant's double jeopardy rights were not violated. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Defendant's claim of double jeopardy, pursuant to the Fifth Amendment, was without merit where application of the Blockburger test revealed that elements of each of the crimes of shooting into a vehicle, Miss. Code Ann. § 97-25-47, and aggravated assault, Miss. Code Ann. § 97-3-7(2) were not contained in the other. Graves v. State, 969 So. 2d 845 (Miss. 2007).

Appellant's conviction for DUI manslaughter and two counts of DUI mayhem in violation of Miss. Code Ann. § 63-11-30 did not subject him to double jeopardy. Each of the counts were predicated upon separate felonies, one instance of manslaughter and two instances of mutilation or mayhem that appellant committed as a result of his drunk driving. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

Trial court properly dismissed defendant's motion for post-conviction relief where he was not subjected to double jeopardy by being convicted of three criminal offenses arising out of a single incident; a criminal defendant could be convicted of more than one offense that arose out of a single event where each offense required proof of a different element. Ward v. State, 944 So. 2d 908 (Miss. Ct. App. 2006).

Offenses of kidnapping under Miss. Code Ann. § 97-3-53 and armed robbery under Miss. Code Ann. § 97-3-79 were clearly separate and distinct, with each requiring proof of additional facts the other did not; kidnapping, for example, required proof of intent to cause such person to be secretly confined or imprisoned against their will, whereas armed robbery did not, and armed robbery required the taking of personal property of another, but kidnapping did not. Thus, the crimes were separate and distinct regardless of their temporal overlap or their arising from a common nucleus of operative facts, and defendant's double jeopardy rights were not violated through being convicted of both kidnapping and armed robbery. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was proper where double jeopardy protection was not implicated because Miss. Code Ann. § 63-11-30(5) required an element not required by Miss. Code Ann. § 97-3-47, namely, that of intoxication. Ramage v. State, 914 So. 2d 274 (Miss. Ct. App. 2005).

15. Sentence and punishment—In general.

Decision to revoke appellant's, an inmate's, probation was appropriate, but a remand to the trial court was necessary because the handwritten addendum to the revocation order caused the inmate's new sentence to exceed the five-year maximum sentence and the State conceded that the handwritten addendum imposing three years' post-release supervision, instead of two years, was a clerical error. Although

the inmate claimed that the new sentence subjected him to cruel and unusual punishment and to double jeopardy, double jeopardy was only violated if the court attempted to administer a longer sentence than what was originally conferred upon the inmate. Whitaker v. State, 22 So. 3d 326 (Miss. Ct. App. 2009).

Inmate's claim that the use of the robbery aggravating factor during sentencing was inappropriate as it allowed the use of the underlying felony, which elevated the crime to capital murder, was without merit on double jeopardy grounds because there was no threat of multiple prosecutions for the same offense or for repeated punishment arising from the same conviction; the sentencing phase of a capital murder trial was one part of the whole trial which included the guilt phase, and the use of the underlying felony at sentencing did not expose the inmate to double jeopardy. Brawner v. State, 947 So. 2d 254 (Miss. 2006), dismissed by 2010 U.S. Dist. LEXIS 7487 (N.D. Miss. Jan. 27, 2010).

Trial court sentenced defendant to criminal contempt for refusal to testify in co-defendant's trial; because his failure to testify constituted a material breach of the plea agreement, the State reinstated the kidnapping charge, for which defendant was subsequently convicted and sentenced to 25 years' imprisonment. Defendant contended that the kidnapping conviction and sentence constituted a second punishment for his refusal to testify, thus subjecting him to double jeopardy; however, defendant was punished once for his refusal to testify against his co-defendant and once for the separate and distinct crime of kidnapping the victims, and, thus, his right double jeopardy rights were not violated as he was not punished multiple times for the same crime. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

15.5. Addition of a condition to a suspended sentence.

Addition of the condition of house arrest to an inmate's suspended sentence was not an impermissible increase in the level of punishment to invoke constitutional concerns of double jeopardy under U.S. Const. Amend. V and Miss. Const. Art. 3, § 22. The inmate had not been actually acquitted or convicted in a former trial on the merits for which he was again sought to be convicted. Williams v. State, 4 So. 3d 388 (Miss. Ct. App. 2009).

16. — — Guilty pleas, sentence and punishment.

Where appellant pleaded guilty to possession of cocaine, he was sentenced to serve ten years concurrently with a sentence for a crime he committed in Tennessee. The trial court did not violate the double jeopardy clause by accepting his guilty plea on one date and then sentencing him during a separate hearing; defendant only received one criminal sentence. Brown v. State, 920 So. 2d 1037 (Miss. Ct. App. 2005).

18. — — Parole, probation, or suspended sentence, sentence and punishment.

Where appellant served four years of his six-year sentence for the sale of cocaine, he was released; upon the revocation of his suspended two-year sentence, the trial court violated appellant's protection against double jeopardy by imposing a three-year term of imprisonment. The trial court exposed him to a period of incarceration exceeding the original suspended sentence. Branch v. State, 996 So. 2d 829 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

21. Different elements, no double jeopardy.

Defendant's argument that the application of Miss. Code Ann. § 97-37-37 constituted double jeopardy because it required proof of the same elements as the underlying crimes was procedurally barred be-

cause it was not raised at trial. Notwithstanding the procedural bar, the argument was without merit because the statute was clearly a sentence enhancement and did not set out separate elements of the underlying felony. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Crime of sexual abuse of a vulnerable adult under Miss. Code Ann. § 43-47-19 does not encompass the crime of sexual battery under Miss. Code Ann. § 97-3-95, and a conviction of both offenses does not implicate double jeopardy concerns because the crimes require additional and different elements of proof; specifically, the former offense does not require proof of penetration, while the latter offense does require this proof. Additionally, abuse of a vulnerable adult requires proof that defendant willfully inflicted physical pain or injury upon a vulnerable adult, while sexual battery has no such requirement; there are additional differences in that sexual battery does not requuire that the victim's abilities to provide for his or her protection from sexual contact be impaired by the infirmities of aging or that the victim be a patient or resident of a care facility, while the charge of abuse of a vulnerable adult does require this additional element. Simoneaux v. State, 29 So. 3d 26 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 115 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 151, 178 L. Ed. 2d 38, 2010 U.S. LEXIS 6093, 79 U.S.L.W. 3196 (U.S. 2010).

Defendant confessed to police that he choked the victim, duct taped a plastic bag around his head to suffocate the victim, placed the victim's body in the trunk of his car, and dumped the body in the woods; double jeopardy did not bar defendant's prosecution for both capital murder and kidnapping. The Supreme Court of Mississippi held that the crimes of capital murder and kidnapping each require proof of an element not necessary to the other. Nelson v. State, 10 So. 3d 898 (Miss. 2009).

Court properly denied defendant's motion for a directed verdict because the crime of statutory rape did not encompass the crime of gratification of lust. The crime of gratification of lust did not require any proof of sexual intercourse or proof of a laceration/tearing of the child's genitalia, and as such, statutory rape required proof of an additional element not required by gratification of lust, and there was no double jeopardy. Branch v. State, 998 So. 2d 411 (Miss. 2008).

Defendant was not subject to double jeopardy, even though defendant was issued a citation for resisting arrest and was later convicted of simple assault on a law enforcement officer, where a clear reading of the statutes established that the two offenses contained an element that was lacking from the other. Roncali v. State, 980 So. 2d 959 (Miss. Ct. App. 2008).

Defendant's motion for post-conviction relief was properly denied where defendant's convictions for conspiracy to commit capital murder, accessory before the fact of grand larceny, and accessory before the fact of burglary of a dwelling with intent to commit assault did not subject defendant to double jeopardy; defendant's crimes were completely different and required proving different sets of elements. Byrom v. State, 978 So. 2d 689 (Miss. Ct. App. 2008).

Defendant's argument that the State should not have been able to prosecute him for capital murder, while at the same time prosecute him for conspiracy to commit capital murder was without merit because the State was required to show that defendant offered two individuals money to murder the victims, which was independent of the two individuals' agreement with defendant that included assisting in the preparations for the man who actually did the killing. Vickers v. State, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's prosecutions for both shooting into a vehicle under Miss. Code Ann. § 97-25-47 and murder under Miss. Code Ann. § 97-3-19(1)(a), did not subject him to double jeopardy since the crimes charged required additional facts separate from each other; murder, unlike shooting into a vehicle, required the deliberate killing of an individual and did not

require defendant to have shot into a vehicle, while shooting into a vehicle required only that defendant willfully shot into or at a vehicle. Further, the facts were such that it was not clear whether defendant shot into the vehicle when he killed the victim, as there was testimony to the effect that the victim may have had all or part of his head outside the vehicle when he was shot; in essence, the facts were such that defendant could have been found guilty of murder and of shooting into a vehicle without any risk of exposure to double jeopardy. Peacock v. State, 970 So. 2d 197 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 23. Searches and seizures.

JUDICIAL DECISIONS

2. Searches and seizures —In general.

2.5. — Excessive force, searches and seizures.

Trial court had not erred by finding that two police officers violated an individual's constitutional rights by using excessive force in arresting him. The officers continued to use force on the individual after he was subdued and handcuffed; as a result, their actions were grossly disproportionate to the lack of resistence the individual offered and malicious. City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2005).

3. — — Expectation of privacy, searches and seizures.

Failing to suppress bag of cocaine was not in violation of defendant's due process rights or his rights under U.S. Const. Amend. IV because the action of the officers in having the bag of cocaine removed from defendant's mouth did not shock the conscience. Ellis v. State, 21 So. 3d 669 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 553 (Miss. 2009).

Defendant failed to establish that he had a reasonable expectation of privacy in

a motel room where money from a bank robbery was found as the room was registered in the name of a third party; as defendant did not produce evidence that he had a reasonable expectation of privacy in the motel room, he lacked standing to contest the search and the admission of the evidence obtained as a result of the search. Lyons v. State, 942 So. 2d 247 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 269 (Miss. 2007).

4. — — Stops and detentions, searches and seizures.

Miss. Const. Art. 3, § 23, was not violated by detaining defendant briefly after a traffic stop; once he stopped defendant's vehicle, the deputy was required to ensure that defendant's temporary license plate was valid and that defendant had liability insurance, pursuant to Miss. Code Ann. § 63-15-4(3). Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Miss. Const. Art. 3, § 23, was not violated because the fact that defendant did not have a license plate that was "conspicuously displayed" on his rental car, as required by Miss. Code Ann. § 27-19-323, provided a reasonable basis to stop defendant's vehicle. The deputy had probable cause to believe that defendant had committed a traffic violation. Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Where an officer saw a vehicle speed out of an apartment complex, he called in the tag and dispatch notified him it was expired; as a result, the officer had reasonable suspicion to pull over the driver over for two traffic offenses. Cole v. State, 8 So. 3d 250 (Miss. Ct. App. 2008).

Motion to suppress evidence was properly denied in a drug case because a Terry stop did not violate U.S. Const. Amend. IV or Miss. Const. Art. III, § 23 where an officer had a reasonable suspicion that a vehicle had no tag in violation of Miss. Code Ann. § 27-19-323 and Miss. Code Ann. § 27-19-40, since the officer could not see a "special in-transit tag" on a tinted window. Gonzales v. State, 963 So. 2d 1138 (Miss. 2007).

7. — — Vehicular searches, searches and seizures.

Miss. Const. Art. 3, § 23, was not violated by detaining defendant after a traffic stop; defendant's behavior and contradictory and unlikely answers aroused the deputy's suspicions. Further, it took only three minutes for another officer to arrive with a dog who alerted for the presence of drugs in defendant's vehicle. Wade v. State, 33 So. 3d 498 (Miss. Ct. App. 2009).

Search of a vehicle was a valid inventory search where defendant was legally arrested, there was no one available to remove defendant's vehicle from the roadside, and under such circumstances, the standard procedure was to call a wrecker to impound the vehicle and conduct an inventory search. Garrison v. State, 918 So. 2d 846 (Miss. Ct. App. 2005).

8. — — Chemical tests, searches and seizures.

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

11. — — Persons entitled to object, searches and seizures.

Where firefighters discovered a locked metal box in defendant's home after they extinguished a fire and turned the box over to the police, defendant lacked standing to challenge the search of the box as unlawful because he denied ownership of the box when questioned by the police. King v. State, 987 So. 2d 490 (Miss. Ct. App. 2008).

12. Search warrants—In general.

After an appellate court reversed defendant's drug possession conviction by find-

ing that the trial court should have granted defendant's suppression motion because the magistrate who issued the search warrant lacked a substantial basis for concluding that probable cause existed and because the probable cause determination was base upon false and/or omitted information, the state supreme court held that there there was no showing that the investigator intentionally misrepresented facts or made them in reckless disregard for the truth; the investigator described the confidential informant (CI) who provided information about defendant's activities as reliable in the past because he knew him to be a reliable CI used by the police department on occasion, and he was able to independently corroborate the CI's reliability when a controlled buy resulted in defendant selling cocaine to the CI. The investigator's omission of the fact that there was a controlled buy the day before did not constitute a reckless disregard for the truth, and the omission was adequately explained by the investigator, who testified that he was protecting the identity of the CI; as such, the warrant was supported by adequate probable cause. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (U.S. 2009).

13. — — Affidavits, search warrants.

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

14. — — Description in affidavit or warrant, search warrants.

There was no error in the denial of a motion to suppress a black box taken from the floorboard of a truck, or the data contained therein, because removal of the black box was within the scope of the search warrant, which specifically stated that the resulting search was to include items inside the vehicle that tended to demonstrate that defendant was intoxicated at the time of an accident. Taylor v. State, — So. 3d —, 2011 Miss. App. LEXIS 238 (Miss. Ct. App. Apr. 26, 2011).

15. — — Showing of probable cause, search warrants.

Defendant's conviction for the possession of child pornography was appropriate because there was a substantial basis for the issuance of the search warrant. The probable cause for the search warrant was not rendered stale simply because an investigator first discovered the allegations 9 or 10 months after the alleged incident occurred and that was especially true in the context of allegations by small children, who might be too ashamed or frightened to inform others that something inappropriate might have occurred because they were expressly ordered or threatened to remain silent. Renfrow v. State, 34 So. 3d 617 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 213 (Miss. 2010).

Search warrant was supported by probable cause because an officer personally observed a drug transaction and subsequently took a statement that the buyer regularly purchased cocaine from the pool hall; that information supported the prior anonymous statements that defendant kept and sold cocaine at the pool hall.

Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Search warrant affidavit was detailed, the confidential informant was an eyewitness to illegal acts and had a reliable track record, and the magistrate proceeded on more than mere suspicion in issuing the warrant; there was no merit to defendant's argument that under the given facts the warrant was fatally defective because of inadequate probable cause, and the trial court did not err in admitting the evidence obtained from the search of defendant's residence. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

When a magistrate issuing a search warrant is given false facts which are indispensable to a probable cause determination, probable cause cannot exist, and the fruits of the search must be suppressed, even if the search warrant was properly issued based on the false facts which were presented to the magistrate; the appellate court reversed and remanded defendant's case to the trial court to consider whether a police officer knowingly and intentionally gave false and misleading information to the magistrate judge issuing the search warrant. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Motion to suppress evidence was denied in a case involving church burglaries because there was probable cause to issue a warrant to search defendant's residence based on statements from a witness that saw defendant and his friend near the church in the middle of the night, a witness that saw defendant carve a certain phrase found at the church on another wall, a neighbor who saw defendant exit a vehicle with the lights off, and another party who saw defendant in possession of property matching the description of some taken from the church. Dimaio v. State, 951 So. 2d 581 (Miss. Ct. App. 2006).

Where defendant was charged with and found guilty of felony driving under the influence of alcohol, the trial court did not err in denying defense counsel's motion to suppress evidence of defendant's blood alcohol results, because the warrant authorizing the blood alcohol test was valid and defendant's constitutional rights had not been violated. Inter alia, the officer observed defendant's slurred speech and staggered walk, and he noted that defendant's breath smelled of alcohol and defendant actually admitted to having drunk four beers that morning and was unable to recite the alphabet. Dove v. State, 912 So. 2d 1091 (Miss. Ct. App. 2005).

Where defendant was convicted of felonious sexual intercourse with a child under the age of 14, felonious sexual penetration with a child less than 18, and possession of materials depicting children under the age of 18 engaging in sexually explicit conduct, the circuit had not erred in not granting his pretrial motion to suppress evidence obtained by a search warrant based on the statements of the child victim, because she specifically stated that defendant had showed her pictures of nude people on his computer screen doing things she described as "gross." She used language to describe acts performed on her and by her in relation to defendant in such sexually explicit terms that veracity could easily be inferred. Foley v. State, 914 So. 2d 677 (Miss. 2005).

16. — — Execution of incorrect or invalid warrant, search warrants.

Trial court did not err by admitting evidence found during the execution of a search warrant based on a clerical error requiring officers to knock and announce; even though officers merely entered after pulling open a chain, the evidence showed they specifically requested a warrant not requiring a knock and announce. Caldwell v. State, 938 So. 2d 317 (Miss. Ct. App. 2006).

21. Warrantless searches and seizures — In general.

22. — — Admissibility of evidence, warrantless searches and seizures.

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evi-

dence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the purpose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309 (Miss. Ct. App. 2009), affirmed by 50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Motion to suppress evidence was denied in a drug case because, even though there was an anonymous tip, deputies had sufficient evidence to warrant a further investigation; the caller gave fresh information, deputies were escorted to defendant's trailer by his mother, and a search warrant was obtained due to other suspicious circumstances that occurred while the deputies were on the property. Four people were seen running from defendant's trailer, and deputies thought that the trailer was on fire due to smoke. Baker v. State, 991 So. 2d 185 (Miss. Ct. App. 2008).

Motion to suppress evidence was denied in an armed robbery case because police had a reasonable suspicion for stopping defendant while investigating the crime; defendant was observed near the robbery about 15 minutes later, and he and the other people with him fit the description of the perpetrators. Carter v. State, 965 So. 2d 705 (Miss. Ct. App. 2007).

There was adequate support for the trial judge to deny defendant's motion to suppress the evidence under the Fourth Amendment and Miss. Const. Art. 3, § 23 because: (1) the initial encounter with defendant could be properly characterized as a voluntary conversation; (2) there was no illegal detention of defendant; and (3) defendant's initial consent and then the withdrawal of his consent after suspicious items were found gave the officers probable cause to believe that more evidence of the manufacture and use of methamphetamine was located on defendant's property, and they obtained a search warrant and uncovered more items. Melton v. State, 950 So. 2d 1067 (Miss. Ct. App. 2007).

Consent alone is sufficient to permit the taking of a blood sample, and there is no need for a search warrant or exigent circumstances; where a defendant wishes for the trial court to consider whether diminished capacity made his consent ineffective, he has the burden of introducing evidence to raise that issue. Sumrall v. State, 955 So. 2d 332 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 137 (Miss. 2007).

23. — — Admissions of defendant, warrantless searches and seizures.

Where an officer was responding to a dispatch regarding a bank robbery, he saw defendant crouched behind cars outside a market; the officer had reasonable suspicion to believe that defendant was a shoplifter and acted reasonably in stopping to investigate, and defendant was not entitled to suppress the statements he made when the officer stopped him because the stop was not illegal. Wilson v. State, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007).

25. — — Inspections, warrantless searches and seizures.

Where a county sought to enter landowners' property in order to determine whether they were in violation of the county flood plain ordinance — and claimed that it was conducting a criminal investigation on the property — the county was required to obtain a search warrant supported by probable cause because absent consent or some recognized exception or exigency for which a warrant was not required, warrantless entries were illegal. Blakeney v. Warren County, 973 So. 2d 1037 (Miss. Ct. App. 2008).

27. — — Arrest, warrantless searches and seizures.

Search and seizure of defendant's truck and the cocaine contained therein were proper as incident to a lawful custodial arrest because defendant was lawfully ar-

rested based on probable cause and the cocaine found inside his vehicle was clearly within the permissible scope of the search, i.e. a container located in the passenger compartment of the vehicle. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

28. — — Motor vehicle searches, warrantless searches and seizures.

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove, when an informant told officers the subject of outstanding arrest warrants would be driving a similar vehicle, because the good-faith exception to the exclusionary rule did not apply as (1) an officer said the officer did not know the identity of the subject of the arrest warrants, so the officer could not reasonably execute the warrants without verifying the suspect's identity, and (2) the officer's misinterpretation of constitutional mandates, contradictions between the officer's arrest report and testimony, and the officer's failure to resolve the suspect's identity made the exception inapplicable. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as the officers' observations and the informant's information gave the officers no reasonable suspicion since the officers acted, without independent investigation, on the caller's vague description of the car. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

It was error for a trial court to deny a defendant's motion to suppress an investigatory stop of the vehicle defendant drove because it was clear error to find that officers who stopped the vehicle were allowed to rely on arrest warrants for another person who, an informant told officers, would be driving a similar vehicle, as (1) the subject of the warrants was not present, and (2) nothing showed the officers knew the description of the arrest warrants' subject's car, so, absent further independent investigation, the officers could only stop defendant to clarify defendant's identity, but the stop exceeded this permissible scope. Eaddy v. State, 63 So. 3d 1209 (Miss. 2011).

Defendants' convictions for possession of more than five kilograms of marijuana were appropriate because, under Miss. Code Ann. § 63-3-1213, defendants' vehicle was seen driving in a careless or imprudent manner and the deputy had the authority to stop them. When defendants acted nervous, the deputy's retrieval of a drug-detecting dog was appropriate and the drug-detecting dog's positive alerts created probable cause for the deputy to search the trunk of the rental car. Shelton v. State, 45 So. 3d 1203 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 548 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 553 (Miss. Oct. 21, 2010).

Where several witnesses testified that the shooter left the murder scene in defendant's car, which the police found at defendant's home shortly after the murder, probable cause existed for a valid warrantless search of defendant's automobile. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

Where an officer heard loud music from defendant's vehicle and saw him cross over the center line, he had probable cause to stop the vehicle; the officer's inability to cite the noise ordinance did not affect the probable cause finding. Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 2 (Miss. 2008).

In a statutory rape case, defendant was unable to challenge the manner in which police obtained a pair of child's panties from his vehicle since the issue was not raised below. Roles v. State, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Defendant's seizure at a roadblock was constitutional because its primary purpose was to check for driver's licenses and insurance cards and because the officers were consistently and indiscriminately stopping every vehicle coming through the roadblock. McLendon v. State, 945 So. 2d 372 (Miss. 2006), writ of certiorari denied

by 551 U.S. 1145, 127 S. Ct. 3008, 168 L. Ed. 2d 727, 2007 U.S. LEXIS 8338, 75 U.S.L.W. 3694 (2007).

Officers had reasonable suspicion to stop defendant's vehicle because they received information from an informant that she had been purchasing marijuana from an individual she knew as "Trouble," further investigation revealed that "Trouble" was defendant, the officers asked the informant to arrange to buy marijuana from defendant, and as defendant's vehicle, which matched exactly the description of "Trouble's" car given by the informant, approached the abandoned bridge, it was stopped by an officer who recognized defendant and knew that he was on probation for a prior conviction. Carlisle v. State, 936 So. 2d 415 (Miss. Ct. App. 2006).

During a traffic stop, defendant was arrested for driving without a license, no taillights, and possession of beer by a minor; his car was searched by police. The circuit court correctly admitted evidence of marijuana found in the vehicle, because the search fit squarely into the automobile exception. Jim v. State, 911 So. 2d 658 (Miss. Ct. App. 2005).

29. — — Probable cause, warrantless searches and seizures.

Officer had probable cause to stop defendant's vehicle based on his observation of an improper turn and a missing headlight, notwithstanding the fact that the officer had received word from dispatch to be on the lookout for a vehicle matching that description. Scott v. City of Booneville, 962 So. 2d 698 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 637 (Miss. 2007).

31. — — Consent or waiver, warrantless searches and seizures.

In a prosecution for manslaughter by culpable negligence and driving under the influence, the trial court did not err when it denied defendant's motion to suppress the results of a blood test because defendant consented to the blood draw. The arresting officer testified defendant consented, and a nurse testified that she would not have drawn the blood without defendant's consent. Setzer v. State, 54 So. 3d 226 (Miss. 2011).

Trial court did not err in failing to suppress evidence obtained through a warrantless search of defendant's automobile where defendant consented to the search and never withdrew his consent. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Motion to suppress deoxyribonucleic acid evidence was denied because officers were not required to give defendant Miranda warnings since he was not detained under U.S. Const. Amend. IV and Miss. Const. Art. 3, § 23 before he consented to a blood draw; the officers went to defendant's residence, asked him to submit to the testing, and defendant rode to the hospital in the front seat of one officer's car. Moreover, defendant's mild mental retardation did not give rise to a finding of per se involuntariness to give consent, and his cooperative nature was also considered. Robinson v. State, 2 So. 3d 708 (Miss. Ct. App. 2008).

Despite defendant being seized when a second officer questioned him by having been placed in the back seat of a police car to be transported to a hospital for a blood test, defendant was not seized when he made a statement and consented to the blood test when he spoke with a first police officer during the first officer's general investigation of an accident; defendant's first consent remained valid as it was never revoked and thus it was not necessary that the second consent be valid. Turner v. State, 12 So. 3d 1 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 303 (Miss. 2009).

Trial court did not err in denying defendant's motion to suppress because: (1) at the hearing on defendant's motion to suppress, two sheriff's deputies testified that defendant gave free and voluntary consent to search defendant's home; (2) a signed and executed consent to search form was introduced into evidence at trial purporting that voluntary consent; and (3) defendant presented no evidence that defendant was impaired or suffered from

diminished capacity when defendant gave the deputies consent to search defendant's home. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Trial court did not commit reversible error in admitting beer cans found in defendant's car into evidence because even though the beer cans were found in the course of a warrantless search of the car, there was no Fourth Amendment violation, as the car was parked on defendant's brother's premises and defendant's brother, as the renter of the premises, had sufficient authority to consent to a search of the premises; because defendant's brother did consent to a search of his premises, the evidence collected pursuant to that consent was constitutionally acquired. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not err in denying defendant's motion to exclude evidence taken from a car that he was driving; because defendant's wife was the titled owner of the automobile, the police were reasonable in their belief that she possessed common authority, joint control, and mutual use over the car so as to give her the authority to consent to a search. Peters v. State, 920 So. 2d 1050 (Miss. Ct. App. 2006).

34. — — Unreasonable searches and seizures, warrantless searches and seizures.

Trial court erred in denying defendant's motion to suppress cocaine evidence in defendant's trial for possession of cocaine with intent to sell because the police lacked probable cause or reasonable suspicion to stop defendant's vehicle where there was no evidence of any traffic violation and the officer's suspicion that defendant was tired or impaired was not sufficient to constitute a reasonable basis for the traffic stop. Trejo v. State, 76 So. 3d 702 (Miss. Ct. App. 2010), affirmed by 76 So. 3d 684, 2011 Miss. LEXIS 602 (Miss. 2011).

Motion to suppress cocaine thrown under a car at a gas station should have been granted under USCS Const. Amend. 4 and Miss. Const. Art. 3, § 23 because there was no reasonable suspicion to support an investigative stop, and other than a police officer's testimony, there was nothing to show an unprovoked flight due to defendant's backing his car; there was no evidence of speed or erratic driving. Rainer v. State, 944 So. 2d 115 (Miss. Ct. App. 2006).

Trial court erred in failing to grant defendant's motion to suppress where, pursuant to Miss. Const. Art. 3, § 23 and the Fourth Amendment, the officers did not have reasonable suspicion to detain defendant because there was no evidence that he attempted to flee the scene when approached by police in what they believed to be a high crime area. Rainer v. State, — So. 2d —, 2005 Miss. App. LEXIS 917 (Miss. Ct. App. Nov. 22, 2005), opinion withdrawn by, substituted opinion at 944 So. 2d 115, 2006 Miss. App. LEXIS 885 (Miss. Ct. App. 2006).

35. Arrest supported by probable cause.

When an officer approached to disperse a crowd drinking alcohol in violation of a city ordinance, he saw defendant drop a bag that the officer believed to be crack cocaine; the recovered bag was confirmed through testing to contain crack cocaine. Under these facts, the officer had more than sufficient probable cause to arrest defendant; therefore, the trial court did not abuse its discretion in admitting the recovered crack cocaine into evidence. Butler v. State, 19 So. 3d 111 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

Even without the evidence from a recorded telephone call, a deputy had probable cause to arrest defendant because the defendant's daughter's allegation of sexual battery alone gave law enforcement officers probable cause for an arrest warrant. Bankston v. State, 4 So. 3d 377 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 110 (Miss. 2009).

In a manslaughter case, defendant's argument that there was an illegal arrest was rejected because there was a reasonable belief that a homicide had been committed based on the statement of a coroner and a doctor who performed an autopsy, as well as the discovery of the

knife used in the murder and the fact that an eyewitness later changed her story that the victim committed suicide and implicated defendant as the perpetrator. Therefore, evidence in the case was properly admitted; it was noted that some of the evidence was found prior to defendant's arrest. Brown v. State, 970 So. 2d 1300 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR. Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment-Drugs other than marijuana and cocaine and unidentified drugs. 12 A.L.R.6th 553.

Construction and application of rule permitting knock and talk visits under Fourth Amendment and state constitutions. 15 A.L.R.6th 515.

Employee's Expectation of Privacy in Workplace. 18 A.L.R.6th 1.

Expectation of Privacy in Text Transmissions to or from Pager, Cellular Telephone, or Other Wireless Personal Communications Device. 25 A.L.R. 6th 201.

Timeliness of Execution of Search Warrant. 27 A.L.R.6th 491.

Validity of Search and Reasonable Expectation of Privacy as Affected by No Trespassing or Similar Signage. 45 A.L.R.6th 643.

Construction and Application of "Automatic Companion Rule" or Person's "Mere Propinquity" to Arrestee to Determine Propriety of Search of Person for Weapons or Firearms. 47 A.L.R.6th 423.

When facts are offered in support of search warrant for evidence of federal drug offense so untimely as to be stale. 13 A.L.R. Fed. 2d 1.

§ 24. Open courts; remedy for injury.

JUDICIAL DECISIONS

1. Construction and application.
3. Right to remedy.
12. Damage to property.

1. Construction and application.

Where delays in a divorce case were caused by a former wife's illness and car accident, as well as the hospitalization of one of the husband's attorneys, the delay was necessary under Miss. Const. Art. 3, § 24; moreover, the husband had no right to a speedy trial. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

3. Right to remedy.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

12. Damage to property.

Where plaintiff residents and land owners sued defendant energy and chemical companies alleging the companies' emitted greenhouse gasses contributed to global warming, resulting in rising sea levels and Hurricane Katrina's ferocity, which combined to destroy plaintiff's property and public property, because the complaint relied on scientific reports, alleging a chain of causation between the companies' substantial emissions and the injuries, the public and private nuisance, trespass, and negligence claims satisfied the traceability requirement for standing under U.S. Const. Art. III, and thus also satisfied standing under Miss. Const. Art. III, § 24, because Mississippi's Constitution did not limit the judicial power to cases or controversies and Mississippi's courts had been more permissive than federal courts in granting standing to parties. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), vacated by 598 F.3d 208, 2010 U.S. App. LEXIS 4253 (5th Cir. Miss. 2010).

§ 25. Access to courts.

JUDICIAL DECISIONS

1. In general.
2. Pro se representation.
3. Representation by counsel.

1. In general.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. §§ 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In a custody dispute, the trial court erred in enjoining the teenage daughter's counsel from discussing the final outcome of the trial with her, because the order effectively prevented the daughter from further prosecuting the civil action brought by her through her counsel in violation of Miss. Const. Art. 3, § 25, and denied her access to legal advice from the attorney who represented her throughout the trial. If the chancellor believed that the daughter was not properly before the court as a party, or felt that it was inappropriate for the daughter to continue as a party, she could have granted the motion to dismiss or appointed a guardian ad litem. D.A.P. v. C.A.P.R. (In re E. C. P.), 918 So. 2d 809 (Miss. Ct. App. 2005).

2. Pro se representation.

Trial court abused its discretion in dismissing an action under Miss. R. Civ. P. 41(b) for failure to obtain counsel because there was no legal basis to support the dismissal, as there was no requirement that a party be represented by an attorney. Holly v. Harrah's Tunica Corp., 962 So. 2d 136 (Miss. Ct. App. 2007).

3. Representation by counsel.

In a medical-malpractice action, although the patient was constitutionally entitled to participate in closing argument, the untimeliness and method by which she sought to participate was impermissible. During closing argument, rebuttal was strictly limited to providing a response to issues addressed in the closing argument; however, when announcing the patient's intention to personally participate, her attorney declared that she would "repeat" her testimony, not rebut arguments made by the doctor. Dunn v. Yager, 58 So. 3d 1171 (Miss. 2011).

§ 26. Rights of accused; state grand jury proceedings.

JUDICIAL DECISIONS

2. Public trial.
3. Venue of trial.
4. Self-incrimination — In general.
6. — — Privilege against self-incrimination.
15. — — Miranda warnings, self-incrimination.
16. — — Request for counsel, self-incrimination.
17. — — Interrogation generally, self-incrimination.
22. — — Voluntariness of admission, self-incrimination.

23. — — Inducements, self-incrimination.
26. — — Confessions generally, self-incrimination.
29. — — Tests and test results, self-incrimination.
30. — — Videotapes, self-incrimination.
33. — — Comment on refusal to testify generally, self-incrimination.
34. — — Comment of counsel on refusal to testify generally, self-incrimination.
37. — — Instructions, self-incrimination.
39. Speedy trial — In general.
42. — — Attachment of right, speedy trial.
43. — — Invocation of right, speedy trial.
44. — — Factors considered, speedy trial.
45. — — Time of demand for trial, speedy trial.
46. — — Delay attributable primarily to defendant, speedy trial.
47. — — Presumptively prejudicial delay, speedy trial.
49. — — Delay attributable primarily to state, speedy trial.
50. — — Delay not attributable to defendant or state.
51. — — Crowded docket, speedy trial.
53. — — Guilty plea, speedy trial.
58. — — Waiver, speedy trial.
59. Fair trial — In general.
63. — — Identification of accused, fair trial.
65. — — Plea bargaining, fair trial.
66. — — Conduct of trial, fair trial.
67. — — Expert witnesses, fair trial.
68. — — Arguments of counsel, fair trial.
69. — — Instructions to jury, fair trial.
72. — — Jury trial.
73. Impartial jury — In general.
75. — — Venire, impartial jury.
78. — — Disqualification for cause, impartial jury.
80. — — Voir dire, impartial jury.
82. — — Racial discrimination in jury selection, impartial jury.
83. — — Race-neutral selection of jury, impartial jury.
84. — — Gender discrimination, impartial jury.
85. — — Trial conduct, impartial jury.
88. — — Review, impartial jury.
89. Nature and cause of accusation — In general.
93. — — Specificity, nature and cause of accusation.
94. — — Amendment of indictment or information, nature and cause of accusation.
96. — — Sufficiency, nature and cause of accusation.
97. — — Instructions, nature and cause of accusation.
99. Compulsory process—In general.
104. — — Continuances, compulsory process.
105. Right to be present at trial—In general.
108. Confrontation of witnesses — In general.
113. — — Child witnesses, confrontation of witnesses.
114. — — Unavailable witnesses, confrontation of witnesses.
117. — — Test results and testing equipment, confrontation of witnesses.
118. — — Informants, confrontation of witnesses.
120. — — Examination of witnesses generally, confrontation of witnesses.
121. — — Impeachment, confrontation of witnesses.
122. — — Hearsay evidence, confrontation of witnesses.
124. Right of accused to be heard.
125. Right to counsel — In general.
127. — — Pro se or hybrid representation, right to counsel.
128. — — Accrual of right to counsel.
129. — — Invocation of right to counsel.
131. — — Counsel of defendant's choosing, right to counsel.
132. — — Conflicts of interest, right to counsel.
134. — — Indigent defendants, right to counsel.
139. — — Parole and probation revocation proceedings, right to counsel.
141. — — Waiver, right to counsel.
142. Ineffectiveness of counsel — In general.
143. — — Waiver of issue, ineffectiveness of counsel.
144. — — Factors considered, ineffectiveness of counsel.
144.5. — — Speedy trial, ineffectiveness of counsel.
145. — — Trial strategy, ineffectiveness of counsel.

146. — — Guilty plea or plea bargaining, ineffectiveness of counsel.
147. — — Jury selection, ineffectiveness of counsel.
148. — — Conduct of trial, ineffectiveness of counsel.
149. — — Examination of witnesses, ineffectiveness of counsel.
150. — — Objection to admission or suppression of evidence, ineffectiveness of counsel.
151. — — Objection to jury instructions, ineffectiveness of counsel.
152. — — Continuances, ineffectiveness of counsel.
153. — — Sentencing proceedings, ineffectiveness of counsel.
154. — — Appeal of cause, ineffectiveness of counsel.
155. — — Pleading, ineffectiveness of counsel.
156. — — Sufficiency of evidence, ineffectiveness of counsel.
157. — — Totality of circumstances, ineffectiveness of counsel.
158. — — Different result or trial outcome, ineffectiveness of counsel.
159. — — Presumptions, ineffectiveness of counsel.
160. — — Burden of proof, ineffectiveness of counsel.
161. — — Post-conviction remedies, ineffectiveness of counsel.

2. Public trial.

Defendant's conviction for fondling was appropriate in regard to the closure of the courtroom to the public during the victim's testimony. Defendant and his counsel remained in the courtroom during the testimony and defendant was permitted to face his accuser during her testimony; the limitation was no broader than necessary to protect the victim during her testimony. Richardson v. State, 990 So. 2d 247 (Miss. Ct. App. 2008).

Defendant's convictions for sexual battery and fondling of a child were appropriate because his right to a public trial under Miss. Const. Art. 3, § 26 was not violated; the requirement of the victim to testify to potentially embarrassing or emotionally disturbing facts of a sexual nature clearly fell within the category of instances in which public exclusion is appropriate. Tillman v. State, 947 So. 2d 993 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 81 (Miss. 2007).

3. Venue of trial.

Trial court abused its discretion in not allowing capital murder defendant to exercise his constitutional right under Article 3, § 26 of the Mississippi Constitution to be tried in the county where the offense occurred. Once defendant requested that the trial court return venue to the county where the offense was committed, the trial court was under an obligation to either grant his request, or at the very least, to offer clear justification for the decision to deny the request and change venue to another county. Maye v. State, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

4. Self-incrimination — In general.

6. — — Privilege against self-incrimination.

Defendant never invoked the right to remain silent but repeatedly asked what defendant was doing at the police station; the police asked defendant about where defendant got the credit cards and defendant never indicated in any way that defendant was invoking the right to remain silent, and thus no substantial right was affected, the plain error rule did not protect defendant, and any error was waived. Smith v. State, 984 So. 2d 295 (Miss. Ct. App. 2007).

15. — — Miranda warnings, self-incrimination.

During defendant's trial for sexual battery of a child, the State did not impermissibly comment on his initial post-Miranda refusal to speak with investigators prior to his later statement about fondling the victim because the prosecutor's statement and an officer's testimony about his prior refusal to speak were simply a recitation of the facts concerning a preceding interview. Beasley v. State, 74 So. 3d 357 (Miss. Ct. App. 2010).

As defendant was given his Miranda warnings at the time of his arrest and before he was questioned, the trial court did not abuse its discretion in allowing the statements into evidence. Bankston v.

State, 4 So. 3d 377 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 110 (Miss. 2009).

Where defendant was being questioned about whether he had been drinking due to the smell of alcohol on him or emanating from within his vehicle, the deputy testified that defendant twice prevented the portable breathalyzer device from properly producing a reading due to biting down on the mouthpiece, the question to defendant about what he would register on the breathalyzer was asked prior to the deputy obtaining an incriminating reading from the breathalyzer device, and no arrest had yet been made; thus, pursuant to the Fifth Amendment and Miss. Const. Art. III, § 26, defendant was not subject to a custodial interrogation and did not need to receive Miranda warnings at the moment he was asked what he would register on a breathalyzer. Keys v. State, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Defendant voluntarily went to the police station, was told about the 15-year-old victim's accusations that defendant had fondled him, and agreed to give a statement to police, he was not placed under arrest before questioning, and the officers emphasized that he was free to end his questioning at any time; thus, defendant was not in custody and therefore was not entitled to the Miranda protections, but out of caution the officers did read defendant his Miranda warnings, and he signed a waiver indicating that he fully understood those rights, and therefore his statement to the police before his arrest was admissible. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

In a murder and aggravated assault case, incriminating statements made to police as defendant was being led to a patrol car were not suppressed because they were not the product of an interrogation; defendant made the statements as police were trying to read him his rights, and he was not questioned until after these warnings were given. Wilson v. State, 936 So. 2d 357 (Miss. 2006).

Appellate court affirmed defendant's conviction in violation of Miss. Code Ann. § 63-11-30 and the denial of his motion to suppress because an officer was not required to read defendant his Miranda rights when the officer first started speaking to defendant about an accident as defendant was not in custody at that time. Levine v. City of Louisville, 924 So. 2d 643 (Miss. Ct. App. 2006).

Trial court did not err in admitting defendant's confession to the police that he was walking by the victim's business and decided to take some things as defendant blurted out the statement after he was read his Miranda rights. Wess v. State, 926 So. 2d 930 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 218 (Miss. 2006).

In a felony child abuse case, no Miranda warnings were required prior to a statement given by defendant at the police station because defendant came in on his own volition, and warnings were given when it became apparent that inculpatory statements were being made; moreover, defendant's contention that threats were made was not credible. Wells v. State, 913 So. 2d 1053 (Miss. Ct. App. 2005).

16. — — Request for counsel, self-incrimination.

In a case in which defendant argued that the trial court should have suppressed her statements because they were taken in violation of her constitutional right to counsel. The record supported a finding that defendant received the Miranda warning, that she knowingly and intelligently waived the rights, and that she freely and voluntarily made the statements, and, pursuant to the Davis decision, she failed to make an unambiguous, unequivocal request for an attorney. Barnes v. State, 30 So. 3d 313 (Miss. 2010).

Defendant's statements, "I need to talk to somebody," "I don't know if I need a lawyer or not," and "Do I have the right to stop talking?," were at best ambiguous requests for an attorney, and investigators did not overstep the constitutional parameters of U.S. Const. Amend. V and Miss. Const. Art. 3, § 26, in following up on defendant's statements with further questions regarding the statements in order to clarify whether defendant was, in fact, requesting an attorney. Blakeney v. State,

29 So. 3d 46 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 114 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 137, 178 L. Ed. 2d 84, 2010 U.S. LEXIS 6081, 79 U.S.L.W. 3198 (U.S. 2010).

17. — — Interrogation generally, self-incrimination.

Defendant's conviction for felony possession of methamphetamine was appropriate in part because there was no evidence suggesting that defendant attempted to invoke his right to counsel or his right against self-incrimination during what was determined to be a voluntary statement to a police officer; each of those rights was required to be invoked. Mooney v. State, 951 So. 2d 627 (Miss. Ct. App. 2007).

22. — — Voluntariness of admission, self-incrimination.

Deputies testified that none of the officers present at the scene told defendant they could do it the easy way or the hard way, and all deputies testified that defendant was not promised a reward or leniency or threatened in any way, such that the State met its burden of proving that defendant's statements were made voluntarily, and the trial court's decision to deny defendant's motion to suppress his statements was not manifestly wrong. Morales v. State, 990 So. 2d 273 (Miss. Ct. App. 2008).

Defendant's confession to murder was voluntary because defendant signed a waiver of rights form, officers testified that defendant was not promised anything for his truthfulness, defendant did not seem to have any problems understanding his rights, and at the hearing, defendant was able to read each right listed on the waiver. Although he claimed to not remember where he lived, or any of his teachers' names, defendant acknowledged initialing the waiver in front of the officers. Booker v. State, 5 So. 3d 411 (Miss. Ct. App. 2008), affirmed by 5 So. 3d 356, 2008 Miss. LEXIS 519 (Miss. 2008).

In an armed robbery case, suppression of an incriminating statement made to police was not appropriate where there was no credible evidence that the statement was involuntary; the evidence did not show that it was falsified or inaccurate, other than defendant's own bare assertions that he made no statement to police. Carter v. State, 965 So. 2d 705 (Miss. Ct. App. 2007).

Where a guilty plea was entered in a sexual battery case, there was no way to later challenge based on an allegation that a confession was involuntary since the right to do so was waived by the entry of the plea; therefore, post-conviction relief was properly denied on this ground. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Detective that was interrogating defendant stated that he told defendant to "tell the truth" and "come clean," and he would tell the district attorney of defendant's cooperation; those statements have been held not to be promises of leniency, and also defendant did not show by testimony or otherwise that the alleged promises of leniency by the detective were the proximate cause of his confession to sexual battery. Divine v. State, 947 So. 2d 1017 (Miss. Ct. App. 2007).

In defendant's manslaughter case, his confession was voluntary because defendant conceded that he gave the statement voluntarily, and he was given Miranda warnings and understood his rights; an officer testified that he was outside of the interrogation room, another officer and defendant came out of the room, and the officer told him that defendant had said "he just lost it and shot her and he would show us where the body was." McBride v. State, 934 So. 2d 1033 (Miss. Ct. App. 2006).

Statement of a thirteen-year-old defendant was properly admitted at his murder trial where he and his mother both signed a Miranda statement, there was no requirement that his mother be present during questioning, and the court was bound to apply the same standards for the voluntariness of defendant's confession as it would for any other confession. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

23. — — Inducements, self-incrimination.

Because defendants entered voluntary and intelligent guilty pleas to armed robbery, they waived the right to challenge the voluntariness of their confessions to such under the U.S. Constitution and Miss. Const. Art. 3, §§ 14 and 26; therefore, their motions for post-conviction relief were denied. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

26. — — Confessions generally, self-incrimination.

Defendant's conviction for fondling a child under the age of 18 was appropriate because, while defendant might not have possessed exceptional intelligence, that was not required to determine that a confession was given voluntarily. Also, nothing indicated that he was intoxicated while giving the confession. Sellars v. Walgreen Co., 971 So. 2d 1278 (Miss. Ct. App. 2008).

Trial court did not err in not suppressing defendant's statement to the police that defendant shot a victim in self defense because although defendant's initial denial of shooting the victim, followed by defendant's recantation of the denial in the face of a witness's accusation, which the jury subsequently saw and heard the witness testify to, was prejudicial, defendant would have been convicted beyond a reasonable doubt even without the tainted statement. Walton v. State, 998 So. 2d 1011 (Miss. Ct. App. 2007), affirmed by 998 So. 2d 971, 2008 Miss. LEXIS 572 (Miss. 2008).

Defendant's self-incrimination rights were not violated because all law enforcement personnel who testified stated that defendant did not appear to have been under the influence of drugs and there was no corroboration to defendant's assertions to the contrary; additionally, defendant's actions on the day of the murders indicated a mind capable of perceiving the world around him and taking control of his own actions. Scott v. State, 947 So. 2d 341 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 262 (Miss. 2007).

Defendant was not denied his various constitutional rights where the court did not impermissibly consider the truthfulness of defendant's confession in deciding it admissible at a suppression hearing because much of the inquiry into truthfulness occurred as a result of impeaching defendant and attempting to ascertain his credibility. Carter v. State, 956 So. 2d 951 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 302 (Miss. 2007).

Defendant's right against self-incrimination was not violated where the trial court admitted his confession to armed robbery into evidence because four full days had elapsed between the time that defendant took crack cocaine and Lorcet and the time that he confessed; his confession could not be said to be the result of intoxication. Thomas v. State, 936 So. 2d 964 (Miss. Ct. App. 2006).

Defendant argued that the stress of the interrogation and wrongful accusations by a detective caused him to confess to acts against the child victim which he did not commit; however, the trial court's finding that defendant's confession was voluntary was not contrary to the overwhelming weight of the evidence because (1) during the second confession, which occurred after defendant expressly requested the interview to continue, he gave a more detailed confession of two acts of sexual abuse against the victim; (2) there was no evidence that any person coerced defendant or promised him anything in return for his confession; (3) it was hard to believe that defendant would think that confessing to sexual abuse of a child would allow the police to release him; and (4) defendant's argument that the cumulation of the detective's lies caused him mental distress and led to his confessions was belied by his testimony at the suppression hearing where he stated that the detective's lies regarding the rape of his stepdaughter did not cause him to confess. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

29. — — Tests and test results, self-incrimination.

During defendant's trial for felony DUI, third offense, the admittance of defendant's refusal to submit to a breath test was not a violation of his right against

self-incrimination under either Miss. Const. Art. 3, § 26 or USCS Const. Amend. 5; thus, defendant's challenge to the constitutionality of Miss. Code Ann. § 63-11-41 failed. Starkey v. State, 941 So. 2d 899 (Miss. Ct. App. 2006).

Consent alone is sufficient to permit the taking of a blood sample, and there is no need for a search warrant or exigent circumstances; where a defendant wishes for the trial court to consider whether diminished capacity made his consent ineffective, he has the burden of introducing evidence to raise that issue. Sumrall v. State, 955 So. 2d 332 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 137 (Miss. 2007).

30. — — Videotapes, self-incrimination.

In a capital murder case, a videotaped confession given by a 16-year-old defendant was admitted as voluntary because officers testified that he was not promised that he would receive treatment as a youthful offender if he gave a statement; the fact that defendant had a limited learning capacity was insufficient until evidence showed that overreaching had occurred. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

33. — — Comment on refusal to testify generally, self-incrimination.

In a capital murder trial, the trial court did not err in not declaring a mistrial after a witness commented regarding defendant's exercise of his right to remain silent where the trial court gave a curative instruction, to which the defense did not object. Birkhead v. State, 57 So. 3d 1223 (Miss. 2011).

Defendant's capital murder conviction was appropriate because the trial court did not err in not declaring a mistrial after a witness's comment regarding defendant's exercise of his right to remain silent. The trial court's instruction, to which the defense did not object, cured the error of the testimony of the investigator; therefore, the investigator's comment on defendant's exercise of his right to remain silent did not constitute abuse of discretion by the trial court, nor reversible error. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Because alleged comments on defendant's failure to testify did not rise to the level of a reversible constitutional error, review on this issue was procedurally barred; however, the claim was meritless at any rate because the prosecutor was not trying to stress by innuendo the fact that defendant elected not to testify when stating that the state's evidence was unrefuted. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Where the prosecutor in no way, either directly or inferentially, put a negative spin on the fact that the defendant exercised his constitutional right not to testify, but merely addressed defendant's failure to present any case at all, the prosecutor did not violate Miss. Const. Art. 3, § 26 and the Fifth Amendment in her closing arguments, and no error was committed by the trial court in denying defendant's motion for a mistrial. Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

34. — — Comment of counsel on refusal to testify generally, self-incrimination.

In a cocaine possession case, defendant's argument that the prosecutor improperly commented on defendant's right not to incriminate himself was meritless. When viewed in context, the prosecutor's comments referred to defendant's lack of defense and not to his failure to testify. Marshall v. State, 22 So. 3d 1194 (Miss. Ct. App. 2009), writ of certiorari dismissed by 2009 Miss. LEXIS 594 (Miss. Dec. 3, 2009).

It is a criminal defendant's constitutional right to choose whether to take the witness stand in his own defense, Miss. Const. art. 3, § 26; consequently, any reference to the defendant's failure to testify implying that such failure is improper, or that it indicates the defendant's guilt is prohibited. However, there is a difference between a comment on a defendant's

choice not to testify in his own defense and a comment on the lack of a credible defense; therefore, when the statement is not an outright violation, an appellate court will review the facts on a case-by-case basis. Mitchell v. State, 21 So. 3d 633 (Miss. Ct. App. 2008), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 575 (Miss. 2009).

Prosecutor's statement "she can't come here with a straight face and tell you I lied for whatever kind, sweet reason counsel opposite might have you believe" was not a comment on defendant's failure to testify. The prosecutor simply responded to the comments that defense counsel made during closing argument. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Prosecutor's remarks did not infringe on defendant's right not to testify because the remarks that defendant could also call witnesses to testify merely attempted to rebut the accusations made by defendant's attorney in his closing argument that the State did not call enough witnesses or present all the evidence that was available to them. Mask v. State, 996 So. 2d 106 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

In a burglary case, defendant's rights under the Fifth Amendment and Miss. Const. Art. 3, § 26 were not violated by a statement made by the prosecution during closing argument, as even though it seemed improper by itself, it was clear from the argument as a whole that the prosecutor was arguing for the credibility of his witness; the trial judge was in the best position to determine the propriety of the comment and it was within his discretion to allow it. Hart v. State, 965 So. 2d 721 (Miss. Ct. App. 2007).

During defendant's trial, the state's examination of an officer properly stopped at the point of the interview where defendant invoked his right to remain silent and went no further, and the officer's testimony about defendant's refusal to write or record a statement was merely a part of the preceding police interview; because defendant gave an oral statement to the police, testimony of refusal to write or record a statement would not prejudice him further, and therefore the trial court did not err in allowing testimony that defendant refused to make a written or recorded statement. Sacus v. State, 956 So. 2d 329 (Miss. Ct. App. 2007).

Prosecutor's comments on the unknown men were a direct comment on defendant's exercise of his right to remain silent and not testify as to who was present, where the prosecutor said that defendant failed to respond to a question about who the men were; there was absolutely no evidence that defendant was ever asked such a question in the first place, much less that he refused to answer it, and thus the prosecutor's comment violated defendant's right to remain silent. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Prosecutor's argument about a hospital was a comment on defendant's right not to testify because the prosecutor commented on the lack of evidence that defendant intended to take the victim to the hospital on an issue where the only one who could have established that issue was defendant; it was an impermissible comment on defendant's failure to take the stand and testify to elaborate on his intent to help the victim, and thus the prosecutor's comment violated defendant's privilege against self-incrimination. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Defendant's right to silence was not violated when the prosecution referred to a witness to a murder as the only witness that could have been produced; this was not a comment on defendant's failure to testify. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

37. — — Instructions, self-incrimination.

Jury instruction that the jury could infer guilt of larceny or theft of property if there was no reasonable explanation for possession of recently stolen property was not an improper comment on defendant's right to remain silent. Riley v. State, 1 So.

3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

39. Speedy trial — In general.

Other than his assertion of prejudice, defendant offered no substantiation for his claim of prejudice; having conducted an analysis of the Barker factors, and considering the case in its totality, there was no actionable violation of defendant's constitutional right to a speedy trial. Clark v. State, 14 So. 3d 779 (Miss. Ct. App. 2009).

Defendant's claims for speedy-trial violations neither established a plain-error basis to justify further appellate review, nor evidenced a miscarriage of justice; regarding delay, the record reflected that defendant assented to the entry of nine separate "Agreed Orders of Continuance" and filed numerous pre-trial motions, and defendant did not suffer prejudice due to a change in a witness's testimony. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Where defendant did not raise the issue below, an assertion that her speedy trial rights were violated in a manslaughter case was not heard on review since an appellate court was not equipped to be a fact finder. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Where delays in a divorce case were caused by a former wife's illness and car accident, as well as the hospitalization of one of the husband's attorneys, the delay was necessary under Miss. Const. Art. 3, § 24; moreover, the husband had no right to a speedy trial. Stuart v. Stuart, 956 So. 2d 295 (Miss. Ct. App. 2006).

42. — — Attachment of right, speedy trial.

Where defendant charged with murder was apprehended in Chicago, Illinois in December 2001, the State of Mississippi lacked jurisdiction over defendant until his extradition. Defendant's right to a speedy trial attached on July 16, 2002 when he was arrested by the Holmes County Sheriff's Department, Mississippi. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

43. — — Invocation of right, speedy trial.

Defendant's conviction for murder was appropriate because his argument that his right to a speedy trial was violated was procedurally barred because he did not raise his constitutional right to a speedy trial except in his brief on appeal. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

44. — — Factors considered, speedy trial.

Defendant's convictions for murder and kidnapping were proper because he was not denied his constitutional right to a speedy trial. In part, although defendant claimed that he was prejudiced by the passage of time between his arrest and the trial because he could no longer recall the names of witnesses or the location of a particular alibi witness, defendant's counsel represented to the trial court that she had never actually spoken to that particular alibi witness, and she admitted that she did not attempt to interview or locate the witnesses at the time of defendant's arrest, over a year and a half before the trial; no explanation appeared in the record as to why defendant did not give his attorney the names or location of those witnesses at an earlier date and therefore, defendant's claims of prejudice were with merit since any prejudice was caused by defendant himself. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he was not denied his constitutional right to a speedy trial since, while there was a delay in the trial, there was no evidence the State deliberately created the delay, nor did defendant object in any way to the delay until the case was set for trial a month later. Further, when defendant did object, he requested the charges be dropped and not that the case be heard sooner; there was also no prejudice to the defense due to the delay. McBride v. State, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's conviction for armed robbery was appropriate because his speedy trial rights were not violated. It did not appear that the delay was done for the purposes of hampering or delaying the defense and defendant further did not show that he was prejudiced because he was unable to locate his girlfriend; the girlfriend's earlier statement to police served to implicate defendant rather than exonerate him. Jones v. State, 27 So. 3d 1172 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 75 (Miss. 2010).

Defendant's conviction for the possession of methamphetamine precursors was appropriate because he was brought to trial within 275 days of his waiver of an arraignment and there was good cause shown for some of the continuances that were duly granted. There was also nothing indicating that the State exercised a deliberate attempt to sabotage the defense by delaying the trial. Houser v. State, 29 So. 3d 813 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

Defendant was incarcerated for a lengthy time, but it was a result of his request for a mental exam and the various requests for continuances, plus he failed to point to any specific inquiry to his ability to prepare his defense; while not considering lightly that a delay did exist, the court recognized that most of the delay was attributable to defendant, he filed his motions for a speedy trial after the bulk of time had elapsed, and he failed to show that he suffered any actual prejudice due to the delay, such that the court could not find that his constitutional right to a speedy trial was violated. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's right to a speedy trial under U.S. Const. Amend. VI and XIV and Miss. Const. Art. 3, § 26 was not violated because despite the fact that more than 600 days had elapsed between defendant's arrest and his trial, the delay attributable to the Sate was for good cause while the delay attributable to defendant was not. In addition, although defendant asserted his right to a speedy trial, he failed to file a motion to sever his trial from that of his co-defendant and the prejudice factor had to be weighed against defendant. Johnson v. State, 9 So. 3d 413 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

Defendant's constitutional right to a speedy trial was not violated by the 603 days between his arraignment and his trial because most of the continuances requested by defense counsel were sought in order to prepare for trial, to allow extra time in light of newly appointed counsel to prepare for trial, to prepare for expert witnesses, to allow new counsel to be appointed because of failing health of defendant's co-counsel, or to obtain records of information needed in preparation for trial; defendant's murder trial was complicated and involved many difficult issues and required extensive expert testimony. During the time of preparation for defendant's trial, Hurricane Katrina struck, causing counsel to be uprooted from the area and eventually replaced due to their relocation, which further contributed to the delay. Smith v. State, 977 So. 2d 1227 (Miss. Ct. App. 2008).

Where almost three years elapsed before defendant's trial for armed robbery, kidnapping, and rape, he was not denied his constitutional right to a speedy trial. Defendant never demanded a speedy trial; most of the delays were for good cause or were caused by defendant; and he failed to show any prejudice. Burton v. State, 970 So. 2d 229 (Miss. Ct. App. 2007).

State was charged with 428 days of delay, which was a 14-month delay that exceeded the eight-month threshold for presumptive prejudice; however, defendant's constitutional right to a speedy trial was not violated because: (1) although defendant filed two motions to dismiss the indictment for failure to provide a speedy trial, that was not equivalent to requesting a speedy trial; (2) defendant's inability to work and support the defendant's family was not the type of suffering required to show that the trial was prejudiced; and (3) the defendant made no assertion that the delay prejudiced the trial. White v. State, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari

denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Under the Sixth and Fourteenth Amendments and Miss. Const. Art. 3, § 26, defendant's constitutional right to a speedy trial was not violated because, although there was a long delay before his trial: (1) defendant did not make a demand for a speedy trial until April 15, 2004, nearly 17 months after his arrest, six months after he was indicted, four months after his trial date had been set, and less than three weeks before the trial was scheduled to commence; (2) he then sought to postpone the case until August 16, 2004; and (3) there was no evidence of any actual prejudice suffered by defendant from the delay. Boone v. State, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Defendant's right to a speedy trial under the Sixth Amendment and Miss. Const. Art. 3, § 26 was not violated, even though a 580-day delay was presumptively prejudicial, because there was good reason for the delay due to an officer's deployment to Iraq, defendant failed to assert his rights, and there was no prejudice shown other than incarceration. Bonds v. State, 938 So. 2d 352 (Miss. Ct. App. 2006).

In a capital murder case, the right to a speedy trial under the Sixth Amendment and the Mississippi Constitution was not violated by a 16-month delay between arrest and the date of trial; although that was presumptively prejudicial, a weighing of the applicable factors showed that there was no violation since the delay was caused by court unavailability and the need for time to complete the investigation, and there was no prejudice shown outside of incarceration itself since the defense was not impaired, no witnesses were rendered unavailable due to the delay, and there was no showing of a loss of evidence. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

Defendant's right to a speedy trial was not violated because, while a delay did exist, defendant failed to assert his right to a speedy trial, did not object to any delays, other than filing the day before trial a motion to dismiss for failure to provide a speedy trial, and failed to show that he suffered any actual prejudice due to the delay. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Where defendant was indicted on July 16, 2002 for murder, his trial did not begin until May 1, 2003. His constitutional right to a speedy trial was not violated, because he was not prejudiced by the delay. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

45. — — Time of demand for trial, speedy trial.

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. McBride v. State, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

Defendant's first motion to dismiss was filed over two years after he was indicted and his motion for a speedy trial was first filed 10 days prior to seeking a continuance and next filed after a trial date had been set; the court found that this weighed against defendant. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's conviction for possession of cocaine, more then 10 grams, but less than 30 grams, in violation of Miss. Code Ann. § 41-29-139(c)(1)(D), was appropriate because his right to a speedy trial was not violated, in part because there was no actual prejudice to defendant as a result of the delay between arrest and trial. Further, defendant was aware of the possibility that charges would be brought against him as a result of his arrest and he did not seek any resolution of the charges until after he was served with the indictment in June 2006. Williams v. State, 5 So. 3d 496 (Miss. Ct. App. 2008), writ of certiorari

denied by 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Defendant's right to a speedy trial did not automatically warrant reversal of defendant's conviction for an alleged violation of the right; rather, a balancing test was conducted, and moreover, defendant's demand for a dismissal of the charge based on an alleged violation of the right to a speedy trial was not the same as the demand for a speedy trial. Guice v. State, 952 So. 2d 129 (Miss. 2007), writ of certiorari denied by 552 U.S. 1042, 128 S. Ct. 645, 169 L. Ed. 2d 515, 2007 U.S. LEXIS 12594, 75 U.S.L.W. 3274 (2007).

46. — — Delay attributable primarily to defendant, speedy trial.

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Court found that the delays were for good cause or mainly caused by defendant; although it took approximately two years for a competency examination to be completed, the court could not count that time against the State because defendant requested the examination, plus he also requested a continuance. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant's constitutional right to a speedy trial was not violated where the state established good cause for the trial delay; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

Trial court had not erred in denying defendant's motion to suppress his confession, because any delay was brought about by defendant, and he waived any rights he had by the postponement because he initiated the postponement of the initial hearing by asking to speak to the deputies on his way to the hearing and telling them that he wanted to make a statement. Defendant then signed a Miranda rights waiver. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

Trial court carefully and patiently examined the testimony and other evidence and provided defendant with ample opportunity to provide evidence that the delay was not attributable to him or good cause; defendant failed to suggest any evidence, potential witness, or case theory which escaped his reach because of the delay, and there was no basis to hold that the delay in the proceedings impaired defendant's defense of the case. Stark v. State, 911 So. 2d 447 (Miss. 2005).

Where defendant was tried 538 days after arraignment, and 264 days of the delay could be attributed against the State, there was no statutory violation under the guidelines set forth in Miss. Code Ann. § 99-17-1. Further, the delay could be attributed to continuances requested upon the motion of defendant's attorneys, substitution of counsel, plea negotiations, ongoing discovery, and potentially the trial date being lost due to a crowded docket, and applying the balancing test to the four factors listed in Barker, and the conduct of the State and defendant, defendant's constitutional right to a speedy trial was not denied. Summers v. State, 914 So. 2d 245 (Miss. Ct. App. 2005).

47. — — Presumptively prejudicial delay, speedy trial.

Defendant was arraigned on August 18, 2005 and his trial finally occurred on February 21, 2008; since the delay exceeded eight months, it was presumptively prejudicial and the cause of the delay had to be analyzed under the remaining factors. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Where 837 days elapsed between the date of appellant's arrest and the date of trial, appellant's speedy trial rights were not violated, because although the 837-day delay was presumptively prejudicial, appellant never asserted the right to a speedy trial and appellant made no allegation of prejudice caused by the delay. Brunson v. State, 944 So. 2d 922 (Miss. Ct. App. 2006).

Defendant was not denied his right to a speedy trial, even though the 14-month delay between the placement of the detainer and defendant's trial date was presumptively prejudicial, because defendant did not file a motion to dismiss for the lack of a speedy trial until one year after his arrest, and there was no evidence to support defendant's claim of lost witnesses or his claim that the delay negatively affected the conditions of his confinement under his previous sentence. Clayton v. State, 946 So. 2d 796 (Miss. Ct. App. 2006), writ of certiorari dismissed by 947 So. 2d 960, 2007 Miss. LEXIS 64 (Miss. 2007).

49. — — Delay attributable primarily to state, speedy trial.

Where defendant waited six-years to file a motion for post-conviction relief, counsel's ineffective assistance in pursuing a speedy trial claim was not an exception to the time bar. While the State offered no explanation for 410 days of delay, defendant failed to show actual prejudice. Thomas v. State, 933 So. 2d 995 (Miss. Ct. App. 2006), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 372 (Miss. 2006).

Although the State failed to prove good cause for the delay in bringing defendant to trial, he did not suffer prejudice as a result of the delay, and where the record did not reflect that defendant ever asserted his right to a speedy trial, his contention that his case should have been dismissed lacked merit. Burton v. State, 914 So. 2d 288 (Miss. Ct. App. 2005).

Period from defendant's arraignment to his trial was within the statutorily required 270 days, Miss. Code Ann. § 99-17-1, but compliance with the statute did not mean that defendant's constitutional right to a speedy trial had been respected; however, the State made its requests for continuances because it needed to secure the testimony of an essential witness. Without the witness's testimony, the State had no evidence showing that the victim was shot, killed, placed in garbage bags, and thrown into a river; because the State requested its continuances for good cause, because the delays were not egregiously protracted, and because defendant failed to show actual prejudice, defendant's right to a speedy trial was protected. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Defendant argued that his trial attorney was ineffective in failing to ask the trial court for funds to hire a DNA expert; however, he did not explain what exculpatory evidence might discovered if a DNA expert were hired but merely claimed that a DNA expert favorable to his case should have been hired to counter the testimony of the experts offered by the State. Because defendant did not claim that the outcome of the case would be different if additional DNA experts had testified, his ineffective assistance claim failed. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

50. — — Delay not attributable to defendant or state.

Under plain error review, defendant's speedy trial rights were not violated by the 496-day delay in bringing him to trial because, even though the delay was presumptively prejudicial and the record reflected no reason for the delay, no prejudice was apparent from the record. It was unlikely that defendant was prejudiced by the absence of his accessory, as it was substantially unlikely that the accessory would have testified that he, rather than defendant, was the shooter. Muise v. State, 997 So. 2d 248 (Miss. Ct. App. 2008).

Defendant was not denied his right to a speedy trial where a total of 810 days elapsed from the date of defendant's arrest to the date on which the trial began, because defendant requested continuances prior to moving for a speedy trial, the State was granted continuances for

DNA analyses and to find a key witness, after DNA tests were ordered, there were several motions filed by defendant and the State, and thus good cause was shown related to matters beyond the control of the State. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Defendant's conviction for murder was proper where his speedy trial right was not violated because the State's motions for continuances were predicated on the fact that DNA testing had not been completed. Additionally, he failed to prove any prejudice. Wright v. State, 915 So. 2d 527 (Miss. Ct. App. 2005).

51. — — Crowded docket, speedy trial.

Defendant's conviction was affirmed because while it was clear that defendant was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10 (Miss. Ct. App. 2010), affirmed by 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

53. — — Guilty plea, speedy trial.

Defendant failed to show a violation of his right to a speedy trial, because defendant waived his right to a trial when he pled guilty. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

Although defendant argued that he was deprived of his right to a speedy trial, a valid guilty plea operated as a waiver of all non-jurisdictional defects or rights incidental to trial and this included a defendant's right to a speedy trial. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

58. — — Waiver, speedy trial.

Defendant waived his speedy trial claim, even though he made a written motion to dismiss on speedy trial grounds, because he never brought that motion for a hearing and he never obtained specific findings from the trial court. Muise v. State, 997 So. 2d 248 (Miss. Ct. App. 2008).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Pool v. Pool, 989 So. 2d 920 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

Where defendant had already filed one post-conviction relief motion raising the same issues, a successive writ was barred under Miss. Code Ann. § 99-39-23(6); at any rate, his guilty plea waived any speedy trial issue, and defendant was not allowed to recast the issue under the guise of ineffective assistance of counsel. Myers v. State, 976 So. 2d 917 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 112 (Miss. 2008).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

Inmate's petition for post-conviction relief was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

59. Fair trial — In general.

The state asked the victim's daughter what impact her mother's death had on

her family's life, to which she replied that it was really horrible, it was on the family's mind all the time, she thought about her mother every birthday and Mother's Day, her five-year-old did not have a grandmother, and that 23 years was a long time to go through that; the daughter's testimony was not designed to incite the jury, but described the impact that losing her mother had on her family, and thus the trial court did not err in denying defendant's motion for a mistrial, which did not violate his due process rights. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Appellate court found no merit to defendant's claim that he did not receive a fair trial on the ground that the State failed to provide him with a copy of the original police report where the only alteration made to the police report was the addition of the word "recovered" written next to the entry regarding the victim's credit card. The trial court allowed defendant additional time to restructure his cross-examination of the officer who wrote the report. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

63. — — Identification of accused, fair trial.

As to an in-court identification in a capital murder and aggravated assault case, due process was satisfied since the factors under Neil v. Biggers, 409 U.S. 188, 196, 34 L. Ed. 2d 401 (1972), were all established; the surviving victim had an opportunity to view defendant as she was pleading for her life, and she was certain of the identification due to the fact that she had known defendant for 15 years, went to school with him, and lived close to him. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

65. — — Plea bargaining, fair trial.

Post-conviction relief was properly denied in a burglary case because the trial court did not clearly err in denying appellant's request for specific performance of an alleged oral plea agreement, as appellant did not argue that he promised any additional servitude to the prosecution that he detrimentally relied upon, the record did not mention any agreement to only sentence appellant to 10 years in prison, and the circuit court had the discretion to reject any suggestion in sentencing that the prosecution presented. Christie v. State, 915 So. 2d 1073 (Miss. Ct. App. 2005).

66. — — Conduct of trial, fair trial.

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Defendant's confession as to a possession of cocaine count did not materially prejudice his right to a fair trial on a sale or transfer of cocaine count because a jury was instructed to consider each count separately and substantial evidence supported defendant's conviction on the sale count. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

Defendant was denied the right to a fundamentally fair trial because defendant was entitled to have the jury determine whether someone else committed the capital murder in that the only direct evidence that defendant was involved was his sister's allegations that defendant killed her husband and defendant's disputed confession; further, defendant had no motive other than to please his sister, and the sister had the means, the motive, and the opportunity to kill her husband, and the trial court's exclusion of evidence clearly prejudiced defendant's right to a fair trial. Edmonds v. State, 955 So. 2d

787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Defendant's right to a fair trial was not violated by introducing evidence of prior DUI convictions during the guilt phase of a trial because they were an element of the crime of DUI third offense; the state was required to prove all the essential elements of the crime charged. Smith v. State, 950 So. 2d 1056 (Miss. Ct. App. 2007).

Supreme Court of Mississippi reversed defendant's conviction for murder and granted him a new trial; the circuit court denied defendant a fair trial by allowing the victim's wife to invoke the Fifth Amendment, admitting unreliable expert testimony, and denying defendant's right to present evidence concerning the victim's tumultous relationship with his wife to show her motive to kill the victim. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant said that defendant had a gun, and then jumped out of the car and ran for shelter; the hearsay statement was both an excited utterance and a present sense impression, and defendant's right to a fair trial was not violated by the admission of the statement. Wheeler v. State, 943 So. 2d 106 (Miss. Ct. App. 2006).

In a case involving capital murder and aggravated assault, defendant was not deprived of a fair trial since the trial court did not abuse its discretion by allowing the prosecutor to ask leading questions; moreover, there was nothing to substantiate defendant's claims of judicial or prosecutorial misconduct. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

In a case involving capital murder and aggravated assault, defendant was not deprived of a fair trial based on the introduction of several crime scene photographs since they had evidentiary value due to the fact that they clarified the testimony of witnesses, gave the jury a visual depiction of the crime scene, and showed the cause of the victims' deaths. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

67. — — Expert witnesses, fair trial.

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend tes-

tified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain expert assistance was properly denied and did not constitute a violation of his due process rights because: (1) on cross-examination, a doctor's testimony rebutted the state's argument that the victim could have retained consciousness for 10-20 minutes as the doctor stated that she might have been unconscious within 30 seconds after manual strangulation or might never have regained consciousness after the blow to the back of her head; and (2) a second doctor's affidavit, stating that the state's investigation of the crime scene and the examination of the victim were problematic, presented nothing in the form of concrete reasons that an independent expert would benefit defendant. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to determine if he was exempt from execution under the Eighth Amendment because of his mental retardation was properly denied and did not constitute a violation of his due process rights because defendant did not show a substantial need for an independent expert because: (1) based on his intelligence quotient tests, one doctor already determined that defendant was mentally retarded; and (2) a second doctor stated in her affidavit that she thought defendant was mentally retarded, and that further testing and a complete social history was necessary to accurately ascertain whether defendant was in fact mentally retarded. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

In a capital murder case, the trial court's refusal to grant defendant's motion for funds to obtain mental health expert's assistance to present mitigating circumstances to the jury was properly denied and did not constitute a violation of his due process rights because he did not show a substantial need for assistance because a review of the record revealed that the jury was presented with mitigating evidence covering all the relevant mitigating factors that defendant sought to show at trial. King v. State, 960 So. 2d 413 (Miss. 2007), writ of certiorari denied by 552 U.S. 1190, 128 S. Ct. 1223, 170 L. Ed. 2d 77, 2008 U.S. LEXIS 1244, 76 U.S.L.W. 3439 (2008).

Trial court did not err in failing to appoint an independent medical examiner where defendant appeared to base his argument on a hope that another medical expert would find another cause of death rather than having any specific evidence to support his defense. Conley v. State, 948 So. 2d 462 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a capital murder case because the issue of whether defendant was denied a fair trial based on alleged falsehoods and misrepresentations by an expert was procedurally barred since it was capable of being raised on direct appeal; moreover, even if it was not, it was not reasonably likely that the statements affected the judgment of the jury, even if they were false, because ample evidence was presented regarding the expert's credibility or lack thereof. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

68. — — Arguments of counsel, fair trial.

Considerable prejudice resulted from the prosecutor's inappropriate statements to the jury and the supreme court was unable to say, beyond a reasonable doubt, that such prejudice was overcome by the evidence; thus, defendant's sentence and conviction were reversed and remanded to the trial court for a new trial. Brown v. State, 986 So. 2d 270 (Miss. 2008).

Prosecutor's statement that the victim had been punished enough and it was up to the jury was not so inflammatory that the trial court judge should have objected on his own, and defendant's claims that the arguments were meant to inflame the jury were procedurally barred because defendant made no timely objections to the statements. Davis v. State, 992 So. 2d 1190 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 529 (Miss. 2008).

Defendant complained that the prosecutor's comments during closing arguments violated the Fifth Amendment and Miss. Const. Art. 3, § 26, but the court found that the statement was not a comment on defendant's right not to testify against himself; the statement did not lead the jury to infer anything about the reasons why defendant did not testify at trial and thus the statement did not rise to the level of serious dimension that would have allowed defendant to overcome the procedural bar, and because defendant did not object, he waived this issue. Davis v. State, 992 So. 2d 1190 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 529 (Miss. 2008).

Statements by the prosecutor during cross-examination of a witness and during his closing statements did not warrant a mistrial because the remark had not created negative inferences based upon defendant's choice to exercise his right not to testify. It was clear from the context of the sentences that the prosecutor was referring to the attorneys and not defendant. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Defendant's right to a fair trial was not denied where the prosecutor's statements, while rambling and tending to bring in extraneous considerations, largely were focused on the need to consider that drugs were dangerous and possession should be a crime; the evidence offered to support conviction was of a person signing for delivery of marijuana, without any evidence that he was otherwise involved in the drug trade; the challenged arguments were not in the "send a message" category and the statements did not interfere with the fairness of the trial. Shanks v. State, 951 So. 2d 575 (Miss. Ct. App. 2006).

Defendant argued that the prosecution's attack on defense counsel implied that he presented a deceptive argument to the jury and violated defendant's due process rights by denying him the right to a fair and impartial trial; although Miss. Unif. Cir. & County Ct. Prac. R. 3.02 prohibited attorneys from attacking the opposing attorney during closing arguments, because the trial court sustained defendant's objection to the prosecutor's first statement, the error, if any, was cured or harmless beyond a reasonable doubt. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

69. — — Instructions to jury, fair trial.

In a murder case, defendant's right to a fair trial was not violated when the jury was not instructed on manslaughter under Miss. Code Ann. § 97-3-47 because there was nothing to support a claim that a shooting was accidental where defendant pointed a gun at the victim and shot her from four feet away; moreover, the evidence indicated that defendant acted with malice where defendant and the victim were arguing so much that the victim's daughter was praying for her life prior to the shooting. Page v. State, 989 So. 2d 887 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

Defendant's right to a fair trial was not violated by a jury instruction given in a capital murder case because it was not required to include a finding on deliberate design since there was no intent to kill required when a person was slain in the course of a robbery. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant complained that a prosecutor's closing argument statement inferred that he might have been sexually inappropriate with the victim in the past; however, looking at the record of the entire trial, the actions of the State did not constitute prosecutorial misconduct and, even if the statements were erroneous, the error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict; thus, defendant was not denied his constitutional right to a fundamentally fair trial because of prosecutorial misconduct at closing argument. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

72. — — Jury trial.

Inmate's right to present issues to a jury expired when he pleaded guilty to the charges. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1) (Rev. 2006), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. Ude v. State, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 2012 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 3, 2012).

73. Impartial jury — In general.

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

75. — — Venire, impartial jury.

There was no evidence of prejudicial effect on the jury by the judge's comments concerning the drug court where the defense did not object once the jury was empaneled and the jury indicated it would fairly decide the case on the facts and law presented; defendant presented no evidence that the judge's comments had a prejudicial effect on the jury except for the fact that they ultimately found him guilty, and the content of the remarks made by the judge were merely informative and could not be deemed inflammatory. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

78. — — Disqualification for cause, impartial jury.

Where a juror in a sexual battery case admitted that she knew many of the witnesses who were going to be called to testify, the trial court did not abuse its discretion under Miss. Const. Art. 3, § 26 by failing to dismiss the juror for cause. The juror did not have a close personal relationship with the witnesses, but only knew them as members of the community; the juror confirmed that she could be fair and impartial. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

80. — — Voir dire, impartial jury.

Trial court did not err when it allowed the State to ask jurors if they could convict a thug for shooting a thug during voir dire because although Miss. Unif. Cir. & County Ct. Prac. R. 3.05 prohibited the posing of hypothetical questions to the venire panel during voir dire that required a juror to pledge a particular verdict, the State asked a hypothetical question about thugs and did not specifically request a verdict during voir dire. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

82. — — Racial discrimination in jury selection, impartial jury.

Use of the word "shall" in Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01 implies that the trial court has no discretion in the number of peremptory strikes given to each side; therefore, a trial court did not err by refusing to allow defendant additional peremptory strikes under § 99-17-3 and

Rule 10.01 after five were denied due to an improper attempt to exclude Caucasian males from the jury in a statutory rape and sexual battery case. Jones v. State, 951 So. 2d 568 (Miss. Ct. App. 2006).

83. — — Race-neutral selection of jury, impartial jury.

Trial court did not err when it allowed the State to use peremptory strikes on five African American venire members and denied defendant's Batson challenges because the State provided a racially neutral reason for the challenged strike and defendant failed to rebut the State's explanations. Defendant was charged with possession of cocaine and three of the potential jurors that were removed by the State's challenges were involved with drugs, one had problems with the prosecutor, and one had voted not guilty in another strong case. Watson v. State, 991 So. 2d 662 (Miss. Ct. App. 2008).

Defendant's right to a fair trial under Batson was not violated by the prosecutor's use of peremptory strikes because a large number of potential jurors knew defendant, defendant's mother, defendant's family, potential witnesses in the case, or the attorneys; the other peremptory challenges by the state were used against a juror whose son was a witness, two jurors who were close friends of the family, and another juror who had a close family member prosecuted by the same district attorney's office. Fisher v. State, 989 So. 2d 893 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 429 (Miss. 2008).

In a capital murder case, there was no violation of Batson based on the striking of African-American jurors because the prosecution gave race-neutral reasons, which included inattention, failure to render a death sentence in a prior case, residence in a high crime area, and employment as a counselor at a mental health facility. White v. State, 964 So. 2d 1181 (Miss. Ct. App. 2007).

If exercising ten of 11 peremptory challenges against African-American members of a venire did not suffice as a prima facie case of purposeful discrimination when one-third of the panel was African-American, then it was difficult to imagine what would; therefore, in a robbery case, the state should have been ordered to provide race-neutral reasons for its use of peremptory challenges because a prima facie case was shown by defendant. Scott v. State, 981 So. 2d 979 (Miss. Ct. App. 2007), reversed by 981 So. 2d 964, 2008 Miss. LEXIS 230 (Miss. 2008).

Defendant did not show a violation of Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), in a capital murder trial by the exclusion of two African-American prospective jurors because race-neutral reasons were offered by the prosecution; even though the reasons given were later determined to be invalid since drug charges against one juror had been dismissed and the other juror was misidentified, this was not enough to warrant a reversal. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

84. — — Gender discrimination, impartial jury.

Defendant's convictions for two counts of armed robbery were improper due to the prosecutor's clear gender discrimination in jury selection. The State was not permitted to keep a person off of the jury simply because of that person's gender. McGee v. State, 953 So. 2d 241 (Miss. Ct. App. 2005), reversed by 2006 Miss. LEXIS 469 (Miss. Aug. 31, 2006).

85. — — Trial conduct, impartial jury.

In defendant's capital murder case, defendant's right to a fair trial was not violated where the momentary, inadvertent and fleeting sight of defendant in shackles by potential jurors, while being transported into the courtroom, absent prejudice shown, did not require a mistrial. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

88. — — Review, impartial jury.

In a case involving the possession of precursors used in the manufacture of a controlled substance, because there was no indication that a Batson challenge was

raised during the jury selection process, any such claim was waived on appellate review. Fillyaw v. State, 10 So. 3d 986 (Miss. Ct. App. 2009).

In a statutory rape case, defendant's challenge under Batson was not heard on appellate review because this issue was not raised at trial; the trial court did not have the opportunity to make findings necessary to preserve the issue for appellate review. Roles v. State, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Defendant's challenge based on Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), in a capital murder case was without merit because he did not raise the challenge at trial; therefore, the trial court did not have the opportunity to make the required fact-findings for an appellate court to review. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

89. Nature and cause of accusation — In general.

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

93. — — Specificity, nature and cause of accusation.

Defendant's capital murder conviction under Miss. Code Ann. ' 97-3-19(2)(e) was reversed where his indictment was insufficient to charge him with capital murder or burglary because it failed to assert the underlying offense that comprised the burglary; it also failed to charge him with murder or manslaughter where it omitted the term "unlawfully" or the phrase "without the authority of law." Jackson v. State, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indictment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

94. — — Amendment of indictment or information, nature and cause of accusation.

In a sexual battery case, the indictment was properly amended by the removal of the phrase "without her consent," because the defense to the charge did not change, and although defendant might have asserted that he was surprised, his surprise could not be characterized as unfair; the net effect of the amendment was that defendant only had to defend one claim, rather than two. Lee v. State, 944 So. 2d 35 (Miss. 2006).

Indictment explicitly stated that defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

96. — — Sufficiency, nature and cause of accusation.

Any error that resulted from an allegedly insufficient indictment for felony driving under the influence causing death or disfigurement, in violation of Miss.

Code Ann. § 63-11-30(5) (Supp. 2010), was harmless because defendant had fair notice and an opportunity to prepare a defense. While the indictment did not allege a specific basis for defendant's negligence, the appellate court specifically stated that it was not making a finding of insufficiency. Regardless, any finding of insufficiency would have been harmless because discovery showed the possibility to two specific negligent acts: driving on the wrong side of the road and speeding. Taylor v. State, — So. 3d —, 2011 Miss. App. LEXIS 238 (Miss. Ct. App. Apr. 26, 2011).

Indictment for fondling and sexual battery was not defective for failing to provide the specific dates that the offenses occurred, as the state had narrowed the time frame sufficiently to put defendant on notice of the nature and cause of the charges against him. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Defendant was properly convicted of sexually battery by digital penetration where sufficient proof showed that defendant was provided notice that he was being charged with sexual battery, and the variance between the language of the indictment and proof at trial was not a fatal error under Miss. Const. art. 3, § 26. Burrows v. State, 961 So. 2d 701 (Miss. 2007).

Because the information did not sufficiently charge defendant with armed robbery, as it did not charge the overt act as the display of a weapon by another perpetrator and then the shooting of the victim, defendant's armed robbery conviction, the result of a guilty plea, was reversed; however, because there was a sufficient charge of simple robbery, if not for the word "attempt," the court affirmed a conviction of robbery, and remanded for sentencing on that count. Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006).

97. — — Instructions, nature and cause of accusation.

It was improper to convict defendant of using her mother's money without her consent in violation of the Mississippi Vulnerable Adults Act of 1986, Miss. Code Ann. § 43-47-19 because although the indictment sufficiently informed defendant of the crime and the conduct the grand jury believed constituted the crime, the trial court erroneously issued a jury instruction that materially conflicted with the indictment's language; the wording of the indictment suggested that the grand jury believed defendant's use of the money was improper only if the money was used without the mother's consent, but at trial, the State produced no evidence that defendant had used her mother's money without her consent, and several witnesses testified that she, in fact, had obtained her mother's consent. Decker v. State, — So. 2d —, 2011 Miss. LEXIS 296 (Miss. June 16, 2011), opinion withdrawn by 2011 Miss. LEXIS 324 (Miss. June 30, 2011).

99. Compulsory process—In general.

104. — — Continuances, compulsory process.

Continuance was not warranted in a capital murder case because defense counsel was aware of one witness before trial and failed to issue a subpoena, and as to a second witness, defendant's rights under the Sixth Amendment and Miss. Const. Art. 3, § 26 were not violated since there was no colorable need for the presence of the witness; moreover, defendant did not show that it was impossible or impracticable to secure an affidavit from the witness. King v. State, 962 So. 2d 124 (Miss. Ct. App. 2007).

105. Right to be present at trial—In general.

The manner in which the trial court instructed a jury to continue deliberations was not error because an inmate had a full opportunity to demonstrate prejudice and failed to do so. Thus, the unrecorded oral ex parte communication did not deny him a fundamentally fair trial. Tyler v. State, 19 So. 3d 663 (Miss. 2009).

108. Confrontation of witnesses — In general.

In defendant's trial for capital murder, while the trial court erred in allowing a letter to be read during sentencing because defendant had no opportunity to cross-examine the author of the letter, in light of the totality of the evidence presented during the sentencing phase, the error was harmless. Pitchford v. State, 45

So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

113. — — Child witnesses, confrontation of witnesses.

In a sexual battery and touching of a child for lustful purposes case, as the trial court was correct in its determination that the statements made by the child to her mother and to her therapist were nontestimonial in nature, they did not trigger the protections of the confrontation clause, and defendant's right to confrontation was not violated. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Trial did not violate a defendant's confrontation rights in admitting a child victim's video statement where he was allowed to cross-examine the victim after she testified in court and he was given an opportunity for re-cross-examination after the statement was entered. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Trial court had not erred by allowing the statements of 5-year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as a part of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

114. — — Unavailable witnesses, confrontation of witnesses.

Defendant's convictions for robbery and capital murder were appropriate because, while the circuit court erred in allowing references to a deceased codefendant's statement to law enforcement to corroborate defendant's statement, the violation of defendant's constitutional right to confront the witness was harmless since the weight of the evidence was overwhelming. Defendant's own statement confessing to robbing the victim and stabbing him in the abdomen with a screwdriver was entered into evidence; other evidence included an officer's and sheriff's recounting of the "treasure hunt" with the codefendant, where they traveled to various areas and retrieved evidence that corroborated defendant's statement to a "T." Singleton v. State, 1 So. 3d 930 (Miss. Ct. App. 2008).

Reversal is required in the interest of justice when the prosecution is permitted to introduce an out-of-court hearsay statement for the truth asserted therein as a result of its main witness's professed loss of memory on direct examination; but, when cross-examined, the witness's responses indicate that his loss of memory is entirely fabricated. Not only was defendant entitle to a new trial after a victim's prior statements were improperly admitted as a result of the victim's memory loss seeming to disappear during cross-examination thereby making the victim available again but admission of the victim's

statements also violated defendant's rights under the Confrontation Clause as defendant did not have an opportunity to cross-examine the victim about his accusations. Smith v. State, 25 So. 3d 313 (Miss. Ct. App. 2008), reversed by 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Testimony that defendant had a sexual relationship with one of the victims, his stepson's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause, as the statements made by the victim, the declarant, were non-testimonial for Crawford purposes, and the declarant was unavailable. Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Defendant's capital murder convictions were proper where his confrontation rights under U.S. Const. Amend. VI and Miss. Const. Art. III, § 26 were not compromised because the statements defendant argued violated his right to confrontation did not constitute testimonial hearsay, which would be barred unless the witness was unavailable and the defendant had a prior opportunity for cross-examination; defendant made no objection at trial that the Confrontation Clause had been violated; and the trial court had determined that the victim, who was the declarant, was unavailable and that the evidence in question showed reliability and trustworthiness. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Where the State's expert witness testified by deposition because he was unavailable for trial before he had reviewed defendant's medical records, defendant was not denied his right to cross-examine the State's expert witness because the court found that the expert had testified that he had had the information that he had needed to testify as to defendant's sanity and the jury heard testimony from eye witnesses, defendant's expert, and others. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

117. — — Test results and testing equipment, confrontation of witnesses.

While the State's expert was accepted as an expert in toxicology, there was no testimony that she was in any way involved in the testing of defendant's blood specimen or that she was actively involved in the production of the report and had intimate knowledge of the analyses even though she did not perform the tests first hand, and the trial court erred in admitting the test results without evidence that the expert actually performed the test or participated in its analysis; however, because overwhelming evidence was presented to the jury that defendant was intoxicated, this error was harmless. Debrow v. State, 972 So. 2d 550 (Miss. 2007).

Defendant's conviction for burglary of a dwelling was proper because there was no merit to his argument that his right to confrontation was denied. There was no testimony or evidence from a fingerprint examiner and the report was neither admitted into evidence nor were the findings ever presented to the jury. Denham v. State, 966 So. 2d 894 (Miss. Ct. App. 2007).

In a capital murder and death penalty case, there were no due process violations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); no DNA testing was done, most of the film had been disclosed, but to the extent that it was not, there was no reasonable probability that the outcome would have been different, and the other evidence had been disclosed to defendant. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

118. — — Informants, confrontation of witnesses.

Trial court sustained defendant's hearsay objections when a police officer at-

tempted to testify to an informant's statements, and the trial court sua sponte directed the police officer to refrain from testifying about what the informant said; thus, the informant's statements were never admitted into evidence, and there was therefore no violation of defendant's right to confront the witnesses against him under USCS Const. Amend. 6 and Miss. Const. Art. 3, § 26. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

120. — — Examination of witnesses generally, confrontation of witnesses.

Defendant's convictions for possession of more than 500 grams but less than 1 kilogram of marijuana with the intent to distribute within 1,500 feet of a church, and possession of more than 10 grams but less than 30 grams of cocaine with intent to distribute within 1,500 feet of a church were proper because his right to confront witnesses against him was not violated when the circuit court prohibited defendant from calling an assistant district attorney who was present during the search of defendant's house as a witness. The district attorney was not a necessary witness, as he had nothing of significance to offer at trial, and defendant was not prejudiced in not being permitted to call the district attorney as a witness. Thompson v. State, 33 So. 3d 542 (Miss. Ct. App. 2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; defendant's right to confrontation was not violated. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

In defendant's criminal prosecution for murder and attempted arson, the State did not dilute defendant's rights of confrontation and cross-examination under Miss. Const. Art. III, §§ 14, 26 by cross-examining and redirecting its witnesses. The State was permitted to redirect a witness about her statement where defense counsel placed the statement at issue by introducing it into evidence on cross-examination; the State was permitted to ask its witness leading questions about the statement. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part because defendant suffered no substantial prejudice in that he was not denied his constitutional right to confront witnesses based on the admission of audiotaped telephone recordings of the pre-drug-buy conversations between the confidential informant and unknown persons. Neither the confidential informant nor the law enforcement officials knew the identity of the voices on the tape, other than the confidential informant, nor did not State or any of its witnesses attempt to state or imply that one of the unidentified voices on the tape recording was defendant's. Brown v. State, 969 So. 2d 855 (Miss. 2007).

It was not an abuse of discretion for the trial court to deny defendant's request for recross-examination of a witness because the prosecutor's questioning on redirect did not go beyond matters raised during cross-examination; the contents of defendant's statement to the witness were fair game for redirect examination because on cross-examination, defense counsel asked the witness if he was "trying to hide something." Bailey v. State, 952 So. 2d 225 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

In a sexual battery of a child case, the victim's grandmother, the babysitter, the psychotherapist, and the doctor were not working in connection with the police; further, their statements were not made for the purpose of aiding in the prosecution because (1) the victim's unsolicited statements were made to his grandmother and his babysitter for the sake of his well-being and not for the purpose of furthering the prosecution; and (2) his statements to the psychotherapist and the doctor were for the purpose of seeking medical and psychological treatment. The

victim was taken to the psychotherapist and the doctor at the family's request and not sent there by police to further their investigation; thus, their testimony did not violate the Confrontation Clause. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

In a sexual battery of a child case, the statements testified to by a police officer and a detective were testimonial and should have been excluded under the Confrontation Clause; therefore, the trial court erred in admitting them. However, similar testimony was properly admitted from four other witnesses; therefore, the testimony was duplicative, and the error was harmless. Hobgood v. State, 926 So. 2d 847 (Miss. 2006), writ of certiorari denied by 549 U.S. 1118, 127 S. Ct. 928, 166 L. Ed. 2d 714, 2007 U.S. LEXIS 143, 75 U.S.L.W. 3350 (2007).

Defendant's convictions for murder and aggravated assault were proper where he was not denied his constitutional right to confrontation because he was permitted to cross-examine the living victim as well as all other witnesses who testified for the State. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

121. — — Impeachment, confrontation of witnesses.

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, the trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Any violation of defendant's confrontation rights was harmless. Spurlock v. State, 13 So. 3d 301 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the error was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

At trial for fondling and sexual battery of a child, there was no merit to defendant's contention that he should have been able to impeach the child's statements by showing that they were not corroborated by the child's cousin, as defendant had had the opportunity to call the cousin as a witness. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Defendant's proffer showed that not only did a witness believe that the prosecutor's office had the power to offer him leniency, but in fact his lawyer was working on it; that was permissible evidence of bias and interest, which defendant was entitled to show under Miss. R. Evid. 616, and without testimony about his beliefs of leniency, the jury was unable to consider if the change in the witness's statements to police and his testimony at trial was because he hoped to ingratiate himself to the district attorney's office. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Because the two witnesses admitted making the prior inconsistent statements and explained them, extrinsic evidence of their statements could not be admitted into evidence under Miss. R. Evid. 613(b); thus, defendant's claim that he was denied the right to cross-examine the witnesses failed. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

122. — — Hearsay evidence, confrontation of witnesses.

None of defendant's contentions required reversal based upon ineffective assistance of counsel where trial counsel's decision to not request a jury instruction fell under the category of trial tactics, and the fact that defense counsel never called defendant to testify in support of an in-

truder defense did not constitute ineffective assistance of counsel. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Any violation of defendant's right to confrontation under U.S. Const. Amend. VI or Miss. Const. Art. 3, § 26 due to the trial court's failure to sustain her hearsay objection was harmless because the police officer testified about whether defendant had called 911 in June 2001 to report that her fugitive son had returned to the house but defendant was convicted based on a later incident in February 2002 in which she failed to report that her son had returned to the house. Therefore, the hearsay testimony about the earlier incident was not especially probative of her intent, or lack thereof, to aid her son evade police in 2002 and there was overwhelming evidence that defendant's conduct in the later incident conformed with the elements of the crime of accessory-after-the-fact. Young v. State, 908 So. 2d 819 (Miss. Ct. App. 2005).

124. Right of accused to be heard.

Where defendant presented nothing more than a cursory accusation that his trial counsel refused to put him on the witness stand, in disregard of defendant's desire to testify, and defendant had not adequately populated the record with a transcript of the proceeding before the trial court from which the appellate court could make a determination whether there was any merit to his ineffective assistance accusations, defendant's conviction was affirmed. Young v. State, 33 So. 3d 1151 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 226 (Miss. 2010).

Defendant's conviction for murdering his girlfriend was appropriate because, procedural bar notwithstanding, he was clearly advised of his right to testify, or not, by both his defense counsel and the trial judge. Fannings v. State, 997 So. 2d 953 (Miss. Ct. App. 2008).

Defendant's attorney did not prevent defendant from testifying, but rather the attorney informed the trial court that defendant desired to testify on defendant's own behalf; because defendant desired to testify on defendant's own behalf, there was no need for the trial court to warn or advise defendant of the right to testify independent of counsel's advice not to testify, and the trial court did not have to advise defendant of all the possible ill effects of testifying. Scott v. State, 965 So. 2d 758 (Miss. Ct. App. 2007).

Defendant's conviction for murder was appropriate because he was specifically instructed on his right to testify in his own defense and the trial judge was careful to inform defendant that the decision was for defendant alone to decide; the record did not demonstrate that defendant was refused an opportunity to present a defense, and the record and arguments demonstrated that defendant's counsel was satisfied that defendant received what he asked of the trial judge. McCain v. State, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Defendant's right to testify was not infringed upon in a capital murder case where defendant changed his mind and refused to do so after the state asked the trial court to rule on the admissibility of defendant's statements made during a competency hearing; the trial judge provided defendant with a detailed explanation of the right and asked if defendant understood that he was waiving such. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

125. Right to counsel — In general.

Defendant's conviction for felony child abuse was appropriate because his claim that his attorney was an inactive member of the bar and that defendant was unaware of the attorney's status change, did not deprive defendant of his right to counsel. There was no question that the attorney was engaged in the practice of law during his representation of defendant and the attorney's recent status change with The Mississippi Bar was harmless error because defendant failed to show any prejudice as a result of the attorney's status and because such status had no effect on the jury's determination of guilt.

Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Appellant's conviction for two counts of sexual battery was upheld because he did not allege that he suffered any untoward consequences because he did not have pre-indictment counsel, aside from the fact that he was indicted; he claimed only that, if counsel had been available, counsel could have objected to the hearsay testimony introduced during the grand jury proceedings, and could have filed a motion to dismiss. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

127. — — Pro se or hybrid representation, right to counsel.

Trial court did not err in ordering defendant to proceed to trial with a court-appointed attorney since no other attorney had ever entered an appearance or filed a motion on defendant's behalf, and appointed counsel indicated that no other attorney had ever contacted the attorney in regard to defendant's representation; the trial court was not required to question defendant as to satisfaction with the appointed counsel in the absence of any indication that the defendant was dissatisfied with defendant's attorney. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

Defendant claimed that his trial counsel was ineffective, but as defendant voluntarily assumed the role of trial counsel, he could not claim that his adviser failed to provide him with adequate representation; simply put, defendant could not benefit on appeal from his own ineptitude at trial. Jackson v. State, 943 So. 2d 720 (Miss. Ct. App. 2006).

128. — — Accrual of right to counsel.

Defendant did not have a right to have counsel present at the identification because he was merely a suspect and criminal proceedings had not yet been initiated against him at the time of the show-up identification procedure. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

129. — — Invocation of right to counsel.

Defendant's conviction for felony possession of methamphetamine was appropriate in part because there was no evidence suggesting that defendant attempted to invoke his right to counsel or his right against self-incrimination during what was determined to be a voluntary statement to a police officer; each of those rights was required to be invoked. Mooney v. State, 951 So. 2d 627 (Miss. Ct. App. 2007).

131. — — Counsel of defendant's choosing, right to counsel.

Trial court did not err in failing to move for a continuance sua sponte or to grant a continuance at the request of the inmate because there was no proof in the record to support the inmate's allegation that he had retained his own counsel, a proposed receipt did not state that it was for representation of the inmate's case, and the inmate's appointed counsel was present and ready for trial. Harris v. State, 999 So. 2d 436 (Miss. Ct. App. 2009).

Defendant's right to be represented by his choice of retained counsel was not violated when a trial court denied his motion for a continuance on the morning of trial so that he could discharge his substitute counsel and hire new counsel where there was adequate time between his original attorney's activation to Iraq and trial for him to retain other counsel. Sturkey v. State, 946 So. 2d 790 (Miss. Ct. App. 2006), writ of certiorari denied, writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), writ of certiorari denied by 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167, 76 U.S.L.W. 3165 (2007).

132. — — Conflicts of interest, right to counsel.

By dismissing defendant's former attorney, after defendant gave him counterfeit documents concerning a stolen vehicle for which defendant was being charged, the trial court did not violate defendant's constitutional right to counsel because, as the attorney was going to be called as a witness in defendant's subsequent trial, the conflict of interest between defendant and his former attorney required his removal as counsel. There was no evidence that the conflict was manufactured in order to deprive defendant of his former counsel's services or that he suffered undue prejudice by proceeding with his new counsel.

Hayden v. State, 972 So. 2d 525 (Miss. 2007).

134. — — Indigent defendants, right to counsel.

County was properly denied declaratory judgment that Miss. Code Ann. §§ 25-32-7, and 99-15-17, requiring counties to provide legal services for indigent criminal defendants violated Miss. Const. Art. III, § 26 because the county did not show specific examples of when public defenders' legal representation fell below the objective standard of professional reasonableness. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

139. — — Parole and probation revocation proceedings, right to counsel.

Pursuant to Miss. Const. Art. 3, § 26, defendant charged with a violation of post-release supervision was not entitled to counsel at his revocation hearing because, apart from the fact that defendant never requested counsel prior to or during his hearing, he admitted the violations, so his case was not particularly complex. Yance v. State, 30 So. 3d 370 (Miss. Ct. App. 2010).

Post-conviction relief was properly denied in a case involving a probation revocation because appellant inmate did not have the right to counsel since the issues were not complex, and no request for counsel was made. It was noted that the inmate had admitted to violating his probation. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

Denial of the inmate's motion for post-conviction relief was appropriate because his due process rights were not violated by the failure to appoint counsel for him at his probation revocation hearing. The issues relevant to his probation revocation were not complex nor were they difficult to present; thus, the inmate had no right to counsel. Staten v. State, 967 So. 2d 678 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 294 (Miss. 2008).

Where a probation revocation case was not complex since defendant admitted violating the terms of such, and the hearing did not involve any new felonies, it was not error to refuse to appoint counsel. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Post-conviction relief was denied in a case where a portion of a suspended sentence was revoked under Miss. Code Ann. § 47-7-37 because there was no due process violation since the evidence relied upon was listed, there was no double jeopardy violation since the original sentence was reinstated, and counsel was not required since the case was not complex. Pruitt v. State, 953 So. 2d 302 (Miss. Ct. App. 2007).

Where appellant was convicted of two counts of selling a controlled substance, his sentence was suspended during five years of probation, and appellant's probation was later revoked when he was convicted of selling marijuana; appellant was not entitled to appointed counsel for the probation revocation hearing, as he presented no evidence that the probation revocation required counsel or that the court denied his request for counsel. Sanders v. State, 942 So. 2d 298 (Miss. Ct. App. 2006).

141. — — Waiver, right to counsel.

Defendant was not denied his right to counsel because the deputy explained the waiver of rights form to defendant before he signed it and told defendant several times that he had a right to a lawyer. It was defendant who requested to speak with an officer and, ultimately, confessed to the crime and he appeared to understand the waiver of rights form which he signed. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

Trial court erred when it denied defendant his right to self-representation because even though a psychiatric examination found defendant to be operating in the range of low to borderline intellectual function, the record showed that he was competent to assert or waive his constitutional rights, and that he made an unequivocal request to represent himself at his trial for armed robbery, kidnapping,

and burglary. Coleman v. State, 914 So. 2d 1254 (Miss. Ct. App. 2005).

142. Ineffectiveness of counsel — In general.

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Despite contacting a potential witness after trial, there was no evidence to show that the potential witness had anything to contribute to defendant's case. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Inmate failed to prove any instance of deficiency on the part of his counsel because the inmate offered only his own statements alleging deficiency on the part of his counsel and such allegations were directly contradicted in his sworn plea petition and his statements made under oath in which the inmate agreed that counsel advised him of the elements of both crimes and that counsel met his expectations in all aspects of his representation. Willis v. State, 17 So. 3d 1162 (Miss. Ct. App. 2009).

In a case involving the possession of precursors used in the manufacture of a controlled substance, defendant failed to show that he received ineffective assistance of counsel because he did not assert any facts or legal authority in support of his claim that his attorney's failure to obtain a bond was improper. Fillyaw v. State, 10 So. 3d 986 (Miss. Ct. App. 2009).

Court could not say that defendant's trial counsel was deficient in failing to raise the issues that defendant raised in his post-conviction motion because there was no merit to any of the issues raised by defendant in his post-conviction motion which included challenges to his guilty plea and to his indictment. Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 181 (Miss. 2009).

Defendant's allegation of ineffective assistance of counsel was without merit because defendant admitted that he committed second degree arson in violation of Miss. Code Ann. § 97-17-5 (Rev. 2006) and his previous convictions properly subjected him to sentence enhancement under Miss. Code Ann. § 99-19-83 (Rev. 2000). Hughes v. State, 989 So. 2d 434 (Miss. Ct. App. 2008).

Defendant did not demonstrate that trial counsel was ineffective where he did not demonstrate how he was prejudiced by his attorney's failure to object to a witness's testimony, and defendant's crime had not been publicized to a point where a change of venue was needed; trial counsel was not ineffective in not calling a witness to testify on defendant's behalf as there was nothing in the statement that defendant claimed would show another shooter. Lamar v. State, 983 So. 2d 364 (Miss. Ct. App. 2008).

Defendant did not demonstrate ineffective assistance of counsel where his guilty plea admitted all elements of a formal charge and operated as a waiver of all non-jurisdictional defects contained in an indictment; defendant was unable to name any witnesses that should have been interviewed and his attorney advised him of the maximum and minimum sentence. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because the inmate could not demonstrate that, in allowing appellee State to amend an indictment to charge him as a habitual offender, the performance of his counsel was deficient because the inmate received a favorable recommendation from the State in exchange for his plea, the record indicated that the inmate signed a written waiver acknowledging that he was pleading guilty as a habitual offender under the amended indictment, and the circuit judge confirmed that fact with the inmate in their plea colloquy before he allowed the inmate to enter his guilty plea. Jones v. State, 994 So. 2d 829 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 659 (Miss. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge; defendant's counsel per-

formed a thorough cross examination of the witnesses called by the State; and defendant showed no prejudice in having the trial judge preside over the case. Williams v. State, 971 So. 2d 581 (Miss. 2007).

Defendant's ineffective assistance of counsel argument was without merit because defendant offered no evidence other than defendant's own allegations that defendant's counsel's performance was deficient, and had no proof that the outcome would have been different had counsel conducted an investigation. Frith v. State, 984 So. 2d 316 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 293 (Miss. June 12, 2008).

Motion for post-conviction relief was properly summarily dismissed because defendant failed to show that his original counsel rendered ineffective assistance of counsel by transferring the case due to either a lack of experience or personal reasons; moreover, advice that was given to the family was not ineffective since defendant was told to plead not guilty. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Claims that defendant argued to be defects in the indictment were insufficient to show deficiency in his counsel's performance or prejudice to his case. Westbrook v. State, 953 So. 2d 286 (Miss. Ct. App. 2007), writ of certiorari dismissed by 962 So. 2d 38, 2007 Miss. LEXIS 436 (Miss. 2007).

Defendant failed to support his allegations of ineffective assistance of counsel and mainly used the issue to reassert his innocence; therefore, the issue was without merit. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Defendant's counsel was not ineffective: (1) in failing to offer a jury instruction on defining reasonable doubt because the practice in Mississippi was to refuse to give a jury instruction on reasonable doubt; or (2) in failing to object and raise in a motion for new trial the failure of the trial court to allow a witness to testify because, although her testimony might have been useful, it would have been cumulative to other evidence. Chandler v. State, 967 So. 2d 47 (Miss. Ct. App. 2006), writ of certiorari denied by 966 So. 2d 172, 2007 Miss. LEXIS 595 (Miss. 2007).

Indictment charging appellant with selling of cocaine was not required to allege the weight of the controlled substance, because it was not an element of the crime defined in Miss. Code Ann. § 41-29-139(a)(1); there was no merit to appellant's claim that counsel was ineffective because of flaws in the indictment. Hammond v. State, 938 So. 2d 375 (Miss. Ct. App. 2006).

Defendant's trial counsel was not ineffective where the indictment clearly informed defendant of the elements of the crime with which he was charged and there was nothing indicating that trial counsel's decision not to interview defense witnesses was not a valid legal strategy; defendant acknowledged that the trial judge advised him she could impose a minimum sentence of two years at his plea colloquy. Brown v. State, 944 So. 2d 103 (Miss. Ct. App. 2006), writ of certiorari denied by 946 So. 2d 368, 2006 Miss. LEXIS 732 (Miss. 2006).

Appellate court affirmed defendant's conviction for sexual battery as sufficient evidence existed to convict defendant and defendant only generally alleged that his attorney's performance was deficient. Curry v. State, 943 So. 2d 78 (Miss. Ct. App. 2006).

In a possession of cocaine case, defendant was not denied effective assistance of counsel when his attorney failed to object to the jurisdiction of the trial court after the State amended the indictment to include the habitual offender charge. The trial court had jurisdiction under Miss. Unif. Cir. & County. Ct. Prac. R. 7.09, and the evidence showed that defendant was afforded a fair opportunity to present a defense and was not surprised with the habitual offender amendment, as required by Rule 7.09. Troupe v. State, 922 So. 2d 844 (Miss. Ct. App. 2006).

Aggravated assault conviction and sentence were affirmed where counsel was not ineffective because the defendant provided no evidence that proved he suffered harm as a result of his attorney not objecting to the State's leading questions or that had his attorney objected to the State's leading questions the outcome would have

been different and trial counsel's failure to object to leading questions by the State could have been a trial strategy. Bullard v. State, 923 So. 2d 1043 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 160 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate where his counsel was not ineffective because there was no double jeopardy violation and the indictment against him was valid and proper. Ramage v. State, 914 So. 2d 274 (Miss. Ct. App. 2005).

Counsel was not ineffective where the defendant claimed he received ineffective assistance of counsel because his attorney filed a motion for continuance without defendant's knowledge or permission, failed to pursue defendant's right to a speedy trial, failed to respond to the State's motion in limine to exclude character evidence of the victim, failed to submit a limiting instruction to the jury regarding defendant's prior felony conviction, and failed to file a motion to sever his murder charge from his charge of possessing a firearm. The appellate court held that the right to effective counsel did not entitle the defendant to an attorney who made no mistakes at trial. Jenkins v. State, 912 So. 2d 165 (Miss. Ct. App. 2005).

143. — — Waiver of issue, ineffectiveness of counsel.

Because an inmate's claims in his motion for post-conviction relief that his appellate counsel was ineffective were decided on direct appeal, those issues were procedurally barred from appellate review by the doctrine of res judicata; the inmate's claim that his appellate counsel failed to cite his trial counsel's error in not litigating his claim of an illegal search and seizure of his vehicle was procedurally barred because the inmate failed to raise the claim of illegal search and seizure during the trial and on direct appeal. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Issues of an involuntary guilty plea, ineffective assistance of counsel, a defective and improper indictment, and misconduct on the part of the state officials that were presented by an inmate in a motion for post-conviction relief were procedurally barred because the inmate waited more than six years after the inmate was convicted to file the motion; furthermore, the trial court found that none of the exceptions to the three-year statute of limitations of Miss. Code Ann. § 99-39-5(2) were applicable, and thus the inmate was not entitled to post-conviction relief. Davis v. State, 958 So. 2d 252 (Miss. Ct. App. 2007).

144. — — Factors considered, ineffectiveness of counsel.

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's claims that his attorney was physically infirm and lacked the stamina required to represent a criminal defendant was without merit; there was no evidence in the record to show that the attorney's need to sit instead of stand prejudiced the defense in any way. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's contention that his attorney did not prepare a proper defense because the attorney made certain assertions during opening statements that were not proven by the evidence presented at trial was without merit; it was unclear from the record that the assertions amount to the attorney's lack of preparation and defendant failed to prove that the outcome of the trial was prejudiced by the comments, especially in light of the overwhelming weight of evidence against defendant. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel gave numerous reasons for his decision to not request a transfer of venue and he stated that he discussed that strategy with defendant and his family; thus, defendant failed to show that his counsel was deficient for not requesting a change of venue. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009),

reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Although defendant argued that his counsel erred in allowing a death certificate to be admitted, there was no indication that a death certificate had actually been admitted; therefore, defendant's contention was without merit. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. There was no merit to defendant's contention that trial counsel was deficient for failing to seek out the victim's medical records; to date, no medical records had been produced and therefore, there is no showing that the records would have provided anything of use to defendant. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel at trial and on direct appeal. The record demonstrated that the inmate's counsel investigated the case and was prepared for the trial and none of counsel's alleged errors or deficiencies substantially affected the outcome of the trial. Robert v. State, — So. 2d —, 2009 Miss. App. LEXIS 747 (Miss. Ct. App. Nov. 3, 2009), opinion withdrawn by, substituted opinion at 52 So. 3d 1233, 2011 Miss. App. LEXIS 45 (Miss. Ct. App. 2011).

Denial of appellant's, an inmate's, petition for postconviction relief was appropriate because his allegation of ineffective assistance of counsel was without merit. During his plea hearing, he stated that he had not been promised anything, coerced, or threatened by anyone into entering his plea and he testified that he was satisfied with counsel's performance; additionally, he acknowledged that he understood that by entering a guilty plea that he was admitting to the facts as read from the indictment and thus, his guilty plea was entered voluntarily and knowingly. Jordan v. State, 21 So. 3d 697 (Miss. Ct. App. 2009).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because she failed to prove that she received the ineffective assistance of counsel. At her plea hearing, the inmate stated that she was fully informed of the charges against her, that she wished to plead guilty, and that she was satisfied with the services that were provided by her attorney. Harding v. State, 17 So. 3d 1129 (Miss. Ct. App. 2009).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because defendant failed to prove that he received the ineffective assistance of counsel in that he failed to demonstrate how any alleged deficiencies on the part of his counsel prejudiced the defense. Defendant's own statement and that of his half-sister were sufficient to prove the State's case of attempted armed robbery. McClendon v. State, 17 So. 3d 184 (Miss. Ct. App. 2009).

Inmate's contentions did not raise sufficient questions of fact regarding his ineffective assistance counsel claim to warrant an evidentiary hearing; although the inmate claimed his attorney failed to investigate the possibility that the inmate was having mental problems, the attorney was unable to locate the inmate's psychiatrist or his medical records, and the inmate's affidavits did not pertain to his mental health. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because his indictment was not faulty for its failure to contain a provision for his eligibility for parole since it was not an essential element of the crime or had no effect on jurisdiction. His attorney was not ineffective for failing to object to a valid indictment. Bowling v. State, 12 So. 3d 607 (Miss. Ct. App. 2009).

Where indictments charging defendant with the sale of cocaine were not defective,

there was no reason for defense counsel to object; hence, counsel was not ineffective. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Inmate's contentions did not raise sufficient questions of fact regarding his ineffective assistance counsel claim to warrant an evidentiary hearing; although the inmate claimed his attorney failed to investigate the possibility that the inmate was having mental problems, the attorney was unable to locate the inmate's psychiatrist or his medical records, and the inmate's affidavits did not pertain to his mental health. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Attorney had not rendered ineffective assistance in failing to present mitigation evidence of a defendant, who was convicted for capital murder and sentenced to death, because the defendant did not suffer prejudice; if the evidence of the defendant's mental and educational problems, history of substance abuse, and troubled childhood had been admitted, the details of the defendant's criminal activity and drug use also would have been admitted. Doss v. State, — So. 2d —, 2008 Miss. LEXIS 608 (Miss. Dec. 11, 2008), opinion withdrawn by, substituted opinion at, remanded in part by 19 So. 3d 690, 2009 Miss. LEXIS 510 (Miss. 2009).

Defendant's conviction for murdering his girlfriend was appropriate because he failed to prove that he received the ineffective assistance of counsel. The fact that the jury deliberated approximately 16 minutes before finding him guilty did not equate with ineffective assistance of counsel; a more probable explanation was that the overwhelming evidence against defendant, paired with proper jury instructions, made the jury's decision clear. Fannings v. State, 997 So. 2d 953 (Miss. Ct. App. 2008).

Performance of appellant's counsel was not deficient and thus not ineffective because (1) counsel did not have to object to the amendment of the indictment since the indictment was properly amended to reflect appellant's status as a habitual offender; (2) the circuit court clearly and adequately informed appellant of the consequences of his guilty plea before accepting it; and (3) appellant's counsel apparently had another pending felony charge against appellant dismissed as a result of his voluntary plea. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

In appellant's capital murder case, counsel was ineffective in regard to a lineup identification because attorneys presented affidavits that they were not present at the lineup, and the witness's identification of appellant was crucial to the State's case. Minimal efforts on the part of trial counsel could have confirmed the presence or non-presence of counsel at the lineup. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Defendant's ineffective assistance of counsel claim on direct appeal was dismissed because (1) the record evinced that defendant was represented by two experienced defense attorneys; (2) the decisions of which defendant complained fell within the presumption of trial strategy and reasonable professional assistance; and (3) the failure to request an accident jury instruction was not prejudicial because it would have been denied had it been requested. Staten v. State, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Defendant's claim of ineffective assistance of counsel failed, as there was no evidence that counsel improperly coerced defendant to plead guilty (at most, counsel may have given defendant a blunt assessment of his chances of success at trial, which may have led in part to defendant's decision to plead guilty), and even if defense counsel was deficient in not calling certain alibi witnesses provided by defendant, defendant had failed to show any prejudice resulting from that deficiency. Jones v. State, 970 So. 2d 1316 (Miss. Ct. App. 2007).

Two defendants' convictions for depraved-heart murder were appropriate because they failed to prove that they received the ineffective assistance of counsel since, although the first defendant stated that his counsel followed or adopted very action taken by the second defendant's counsel, the first defendant

did not argue or state anything else that proved that his counsel was ineffective; additionally, the second attorney's failure to object to alleged hearsay used in the state's opening statement was deemed to have been trial strategy. McDowell v. State, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Post-conviction relief was properly denied where trial counsel's failure to seek a change of venue because of pretrial publicity was not error, as most of the venire was largely unaware of the case, and those who were unaware of it assured counsel and the trial court that they could be impartial. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Dismissal of the inmate's motion for post-conviction relief was proper in part because he failed to prove that his counsel was ineffective; the inmate failed to demonstrate how the outcome of his case would have been different had his attorney performed the acts that the inmate alleged that the attorney was deficient in failing to perform. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Performance of defendant's counsel was not deficient and he was not prejudice in any way because: (1) the failure to file a motion demanding a speedy trial could not be said to have affected the outcome of the trial because the evidence obtained by the delay was arguably exculpatory since no gun shot residue was found on the steering wheel of the car defendant was driving the night of the shooting; (2) decisions to call witnesses, ask certain questions, or make particular objections fell within the purview of the attorney's trial strategy and could not give rise to an ineffective assistance of counsel claim; and (3) the jury instruction regarding the two-party theory was legally sufficient. Boone v. State, 964 So. 2d 512 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 515 (Miss. 2007).

Appellate court rejected an inmate's claims of ineffective assistance of counsel because the inmate made only conclusory allegations, and all of evidence indicated that the inmate's counsel acted capably. Berry v. State, 924 So. 2d 624 (Miss. Ct. App. 2006).

Although the counsel who represented the inmate had previously prosecuted him on similar charges, the inmate failed to establish that he was deprived of effective assistance of counsel because the inmate did not prove prejudice. Dobbs v. State, 932 So. 2d 878 (Miss. Ct. App. 2006).

Denial of the inmate's motion for post-conviction relief was proper; his counsel was not ineffective because the inmate's argument that his attorney was not convincing enough since the judge ruled against him did not show deficient performance under Strickland. The inmate had credited his counsel with making the correct arguments before the judge. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Time elapsing from the date of defendant's arrest to the beginning day of his trial was more than 31 months, and was presumptively prejudicial under the Barker factor. However, he had not asserted his right to a speedy trial and on appeal, he did not assert that his defense suffered any prejudice because of his lengthy incarceration; he did not contend that witnesses were unavailable because of the delay or that evidence had been lost or destroyed or that his defense against the charges was affected in any way by the delay, and because no actual prejudice was shown, his constitutional right to a speedy trial was not violated. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Most significant factor was that defendant failed to demonstrate how his incarceration and the 31-month delay between his arrest and trial caused him any actual prejudice. Thus, per the Barker factors, the appellate court found that there was no violation of defendant's constitutional right to a speedy trial; secondly, defendant waived his right to complain about the denial of his statutory right to a speedy trial since he did not assert that right until well after the statutory deadline had passed, and because his assertions as to a denial of his speedy trial rights would not

have resulted in a different outcome to the case, counsel was not ineffective in failing to raise said issues. Guice v. State, 952 So. 2d 187 (Miss. Ct. App. 2006), affirmed by 952 So. 2d 129, 2007 Miss. LEXIS 9 (Miss. 2007).

Inmate failed to establish that he was deprived of effective assistance of counsel due to his counsel's failure to pursue an insanity defense, to have him evaluated or to obtain his records from the United States Army showing he was discharged for reasons related to his mental health, as he did not offer evidence in support of his claims, other than unsubstantiated allegations, sufficient to overcome the strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. Thomas v. State, 930 So. 2d 1264 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief without an evidentiary hearing was proper pursuant to Miss. Code Ann. § 99-39-19 because his claim that his counsel was ineffective was without merit. The inmate did not suggest that mitigating evidence was available and did not identify a witness or situation that might have convinced the judge to impose a lighter sentence. McNabb v. State, 915 So. 2d 478 (Miss. Ct. App. 2005).

Defendant's murder conviction was appropriate where her counsel was not ineffective because he participated in an extensive voir dire of the jury and in the cross-examination of the State's witnesses. Further, he called four witnesses on behalf of defendant who supported her theory of the case. Lyle v. State, 908 So. 2d 189 (Miss. Ct. App. 2005).

144.5. — — Speedy trial, ineffectiveness of counsel.

Post-conviction relief was denied because appellant inmate did not show that he received ineffective assistance of counsel due to a failure to file a constitutional speedy trial motion because there was no showing that it would have been successful; even though the reason for an 8-month delay weighed in the inmate's favor, the inmate did not show that he was prejudiced, other than due to his pretrial incarceration. Moreover, there was no evidence that the inmate had asserted the speedy trial right. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

145. — — Trial strategy, ineffectiveness of counsel.

On appeal from his conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone, the record before the appellate court was not adequate to determine whether counsel's decision to allow a statement into evidence constituted ineffective assistance of counsel because it could have been argued that counsel might have agreed to the admission of the statement with the hope that the jury would conclude that the charges against defendant were not filed not because he actually possessed the contraband, but because he refused to work as a confidential informant for the authorities. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

On appeal from his conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone, the record before the appellate court was not adequate to determine whether counsel's decision to allow a statement into evidence constituted ineffective assistance of counsel because it could have been argued that counsel might have agreed to the admission of the statement with the hope that the jury would conclude that the charges against defendant were not filed not because he actually possessed the contraband, but because he refused to work as a confidential informant for the authorities. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel's choice of whether or not to argue a motion was trial strategy and it was possible that defendant had already made the decision that he would not testify; if so, the attorney's argument in the Peterson hearing would have been unnecessary. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, counsel's choice of whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fell within the ambit of trial strategy; the attorney most likely wished to avoid drawing further attention to the photographs referenced by the prosecutor that depicted the severity of the victim's injuries. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel explained his reason for not further developing evidence of defendant's medical history and the issue at trial was whether defendant killed the victim; to date, nothing had been introduced to show what defendant's medical records would have shown in his defense. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's conviction for murder was appropriate because he failed to prove that he received the ineffective assistance of counsel. Counsel testified that he discussed whether to introduce an online chat transcript with defendant and that the reason it was not introduced was that in the transcript, the victim said that she could not kill herself; defendant had alleged that the victim killed herself in a suicide pact and that he did not murder her. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

In terms of whether or not trial counsel was ineffective for entering polygraph evidence into the record, it fell under the scope of trial strategy; defendant attempted to show that he was tricked into making his statement during his interrogation by the polygraph examiner, and allowing such evidence was not reversible error. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court rejected defendant's claim of ineffective assistance of counsel; because the defense was that defendant killed the victim in self-defense, counsel's statement conceding that defendant killed the victim was a tactical decision. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Nothing in the record rebutted the presumption that defendant's attorney's decision not to call witnesses was sound trial strategy, and defendant presented no evidence that the victim impact statement was inaccurate; defendant presented no evidence that there was any agreement that the State would not argue for the maximum sentence, and defendant received the agreed recommendation. Martin v. State, 20 So. 3d 734 (Miss. Ct. App. 2009), writ of certiorari dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 21 (Miss. 2010).

Trial counsel's representation was not ineffective because admission of photographic lineup was for strategic purpose of attempting to establish that defendant could not have been the man who had robbed the store. Conner v. State, 26 So. 3d 383 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 36 (Miss. 2010).

In a case involving the sale of cocaine, defendant did not receive ineffective assistance of counsel because it was not ruled out that a cross-examination regarding an informant's previous trips to defendant's house and a stipulation to the conviction of a third party who also sold drugs to the informant were just sound trial strategy. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

Defendant's claim that counsel was ineffective for not interviewing defendant until the day before the trial was without merit; counsel was able to procure a sentencing deal where defendant would not be sentenced as a habitual offender and arranged for the dismissal of another charge with a potential 60-year sentence. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Defendant's trial counsel was not ineffective for failing to file a motion to sup-

press any pretrial identification because, although defense counsel thought that a motion to suppress had been filed, the overwhelming evidence against defendant was indicative that even if the prior identifications were stricken, there would be no alteration of the outcome of the trial. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

Defendant's trial counsel was not ineffective because wearing a prisoner's uniform or clothing during his trial was not necessarily a reversible error where, during pretrial motions, the trial court gave defendant the opportunity to object to wearing prison attire, and he chose not to, and where clothing was found for him after the first day of his trial. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

On appeal of defendant's conviction for sexual battery, he failed to prove that trial counsel was ineffective or that he was prejudiced by counsel's failure to investigate, call witnesses, or dismiss a juror. Defendant failed to show how additional investigation would have significantly aided his case during trial; counsel was permitted wide latitude in his choice of defense strategy; and the juror who knew several of the witnesses stated that she could be fair and unbiased. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

Where defendant shot his sister after he suffered a head injury, witnesses testified that he did not appear to be aware of what he was doing. On appeal of defendant's conviction for murder, the record did not affirmatively show that counsel was ineffective for failing to investigate defendant's alleged impaired mental state. Page v. State, 987 So. 2d 1035 (Miss. Ct. App. 2008).

Counsel was not deficient for failing to allege that defendant was incompetent to stand trial for aggravated assault where defendant admitted that before trial he had started to take his medicine again and could now think straight. Furthermore, defendant participated in his defense, made a closing argument, and discussed his case and the insanity defense with his cellmate. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Even though counsel was deficient in failing to pursue an insanity defense in an aggravated assault case, defendant was not prejudiced thereby because the M'Naghten test was not satisfied; defendant understood the consequences of his actions. Defendant stated that he shot his stepfather for "messing with his mother's mind." Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Where appellant was convicted of sexual battery and fondling, trial counsel was not ineffective for failing to call a medical professional to testify that a bicycle accident caused the victim's injury. It was common in criminal trials for the defense to put on no evidence as a means of emphasizing the weakness of the prosecution's evidence. Sharp v. State, 979 So. 2d 713 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 163 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because his counsel was not ineffective; defendant's prior convictions surfaced as a product of his impeachment regarding his assertions of an ongoing, consensual sexual relationship with the victim, and counsel's decision whether to request a limiting instruction regarding a part of the evidence against defendant might have been part of the trial strategy. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Defendant failed to satisfy the deficiency prong of the Strickland analysis where the shirt and gun were relevant evidence because he wore the shirt and had the gun that night and both were similar to the limited descriptions the victims gave; trial counsel's failure to object in the case was reasonable trial strategy as trial counsel set out to impeach the identifications. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

In an aggravated assault case, defendant did not receive ineffective assistance of counsel based on an allegation that counsel did not let defendant or his stepson testify at trial; the decision not to let the stepson testify was merely strategy, and moreover, defendant was clearly advised of his right to testify, and he was told

that the decision was ultimately his to make. Ellis v. State, 956 So. 2d 1008 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2007 Miss. LEXIS 687 (Miss. 2007).

In a case involving the sale of cocaine, retained counsel was not ineffective due to improper questions during voir dire or improper statements during closing argument because these comments were made to aid the defense, not prejudice it; moreover, the failure to propose jury instructions could have amounted to mere trial strategy. Jones v. State, 961 So. 2d 730 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 962 So. 2d 38, 2007 Miss. LEXIS 415 (Miss. 2007).

Defendant's assertion of ineffective assistance of counsel was rejected in a post-conviction relief case because several decisions merely amounted to trial strategy, such as failing to call a witness, failing to bring up defendant's misconduct, and the scope of the investigation conducted; further, there was no basis for an entrapment instruction, and defendant was informed of his right to appeal. Shorter v. State, 946 So. 2d 815 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied where he failed to provide sufficient evidence demonstrating his attorney's deficiency; defendant admitted in his brief that he could not name the witness that counsel should have interviewed, nor did he disclose the "mitigating information" that counsel allegedly failed to uncover. Jones v. State, 956 So. 2d 310 (Miss. Ct. App. 2006).

Defendant failed to show that he received ineffective assistance of counsel when trial counsel did not move for a change of venue in a capital case because the record did not support the allegation regarding pre-trial publicity, and there was no right to change venue to a jurisdiction with certain racial demographics. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant's request for post-conviction relief was denied on the basis of ineffective assistance of counsel due to an alleged failure to investigate in general because that issue was procedurally barred; however, there was no ineffectiveness based on an alleged failure to investigate during the guilt phase of a capital murder trial since counsel would not have been able to determine that testimony would have been perjury, defendant did not have an alibi defense, and decisions regarding the examination of an expert were trial strategy where there was no showing that the expert was not qualified. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

In a murder case, defendant failed to show that he received ineffective assistance of counsel based on a failure to object to certain statements regarding the copying of keys and the failure to call the victim's former girlfriend; defendant failed to show that the statements were relevant, and the choice not to call a witness was merely trial strategy. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

In an armed robbery case, defendant's counsel was not ineffective by spending as much time as he did attempting to show that defendant left his fingerprints at the scene on an earlier occasion as defendant's fingerprints were the only physical evidence tying defendant to the crime scene; had defense counsel succeeded in establishing that defendant left his fingerprints at some time unconnected with the robbery, then his alibi would have been strengthened. As such, the actions of defendant's counsel concerning the fingerprint evidence fell within the wide range of reasonable professional assistance. Madison v. State, 923 So. 2d 252 (Miss. Ct. App. 2006).

Since it was defendant's contention that he did not know that the receiver was stolen and had not given the witness against him marijuana in exchange for it, it seemed a reasonable decision by trial counsel not to seek an instruction which would have allowed the jury to find defendant guilty of an offense that defendant insisted he did not commit (receiving stolen property valued at less than $ 250), even though it was a lesser offense than the one for which he was being tried. Moreover, since defendant was found in

possession of the stereo receiver, which admittedly was taken along with other items during the burglary, trial counsel may have made the strategic decision not to ask for an instruction tailored to guilt respecting the receiver out of fear that focusing on the receiver also risked highlighting the fact that the receiver and the other items were inevitably linked; thus, counsel was not ineffective for failing to request a lesser-included offense instruction. Primas v. State, 915 So. 2d 1095 (Miss. Ct. App. 2005).

Because the witness's plea agreement was not part of the official record, defendant could not claim that his trial counsel's failure to ask the witness about any deals he made with the State constituted ineffective assistance of counsel. Moreover, defendant did not prove that the plea agreement was in existence at the time the witness testified at trial. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

146. — — Guilty plea or plea bargaining, ineffectiveness of counsel.

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Post-conviction relief was denied where inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

On a motion for postconviction relief based on ineffective assistance of counsel, where inmate offered only his statements alleging the deficiencies of his counsel, which were directly contradictory to his statements made under oath, and where he admitted that the factual bases for the charges were correct, and testified that his counsel reviewed the plea petition with him that he signed and submitted to the trial court, inmate failed to prove any instance of deficiency on the part of his counsel, and, even if there were errors, failed to show with reasonable probability that, but for such errors, the result of his proceeding would have been different. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because he failed to prove that he received the ineffective assistance of counsel. The inmate's testimony that his counsel was ineffective in misrepresenting the sentence that the inmate would have received if he pled guilty was rejected and the appellate court found no basis for disturbing that finding. Mitchener v. State, 32 So. 3d 1218 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 206 (Miss. 2010).

Denial of appellant inmate's motion for post-conviction collateral relief was proper because he failed to prove that he received the ineffective assistance of counsel since he offered nothing more than his own assertions to prove any deficiency on the part of his counsel. In fact, his statements made under oath at his plea hearing wholly contradicted the assertions he currently brought on appeal; the inmate testified that he was satisfied with the work of his counsel, and his counsel reviewed his plea petition with the inmate that he signed and submitted to the circuit court. Brown v. State, 12 So. 3d 586 (Miss. Ct. App. 2009).

Defendant failed to show that defendant received ineffective assistance of

counsel during a guilty plea proceeding because counsel did not coerce defendant into pleading guilty, but simply informed defendant of the likely outcome of the case, believing it would be in defendant's best interest to enter a guilty plea. Defendant, at 55 years old, was charged with four counts of fondling a child; each count carried a maximum penalty of fifteen years in prison. Mayhan v. State, 26 So. 3d 1072 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 58 (Miss. 2010).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for not informing defendant that he could be sentenced as an habitual offender, that his sentence could have been illegal, and that he would not be granted post-release supervision for part of his sentence; defense counsel and the trial court both thoroughly led defendant through the plea process to ensure that he understood his plea did not guarantee him either post-release supervision or a particular sentence. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for failing to object when the trial court enhanced his sentence without giving him the opportunity to withdraw his guilty plea; defense counsel's failure to object if any, was one that originated subsequent to the trial court's acceptance of a valid guilty plea, after it was determined to be voluntarily and intelligently given, based on an acknowledged understanding by the defendant that any "consequences" allowed by law could result. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged conflict of interest because he did not show that defense counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance during a guilty plea. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged failure to conduct an investigation because the inmate did not give specific information satisfying the second prong of the test under Strickland v. Washington, 466 U.S. 668 (1984), or show that the failure to investigate affected the decision to enter his guilty pleas. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied to appellant inmate in a case where he pled guilty to credit card fraud and possession of cocaine because he did not show that he received deficient performance; there was a factual basis for the plea, the inmate indicated that he was satisfied with the performance of his counsel, and no evidence was presented to show any deficiencies. Moreover, the inmate's post-conviction relief motion lacked any supporting affidavits or other proof to support his allegation of ineffectiveness of counsel. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

Where appellant pled guilty to capital murder and aggravated assault, she was not entitled to post-conviction relief based on her ineffective assistance of counsel claim; the trial court found credibility in counsel's testimony that he investigated appellant's case, reviewed the case with her, and concluded that it was her best option to plead guilty. Wilbanks v. State, 14 So. 3d 752 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 382 (Miss. 2009).

Defendant's claim that his attorney rendered ineffective assistance of counsel because he led defendant to believe that he would be placed in the drug court program was without merit as during his guilty plea hearing, defendant swore that his lawyer had not promised him anything to get him to plead guilty and defendant swore that he was satisfied with the services of his attorney. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

When appellant sought post-conviction relief on the basis of ineffective assistance

of counsel in connection with his plea of guilty to murder, he did not attach any supporting affidavits to his motion for post-conviction relief to support his claim that counsel failed to investigate the case; nor did appellant name any potential witnesses that counsel could have interviewed. Because appellant failed to rebut the presumption that counsel performed with competence, the trial court did not err by dismissing his claim of ineffective assistance of counsel. Smith v. State, 1 So. 3d 937 (Miss. Ct. App. 2009).

Appellant inmate's motion for post-conviction relief was properly denied because he failed to show that he received ineffective assistance of counsel based on a failure to object to the terms of a sentence; the inmate also failed to show that his plea was involuntary based on alleged misinformation given by trial counsel regarding sentencing. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

Defendant failed to establish ineffective assistance of counsel with regard to his conviction, based on a guilty plea, for sexual assault because defense counsel was not required to inform defendant that he had to register as a sex offender for his guilty plea to be knowing, intelligent and voluntary; defendant testified under oath during his guilty plead haring that he was satisfied with his attorney's representation; and defendant failed to establish that how his attorney's performance was deficient or prejudiced defendant by the failure to investigate and subpoena certain unidentified impeachment witnesses. Magyar v. State, 18 So. 3d 851 (Miss. Ct. App. 2008), affirmed by 18 So. 3d 807, 2009 Miss. LEXIS 388 (Miss. 2009).

None of an inmate's proffered allegations of deficiency evinced ineffective assistance of counsel, given that (1) the trial court had no duty under Miss. Unif. Cir. & Cty. R. 8.04 to advise the inmate of the right to counsel, and thus counsel's lack of an objection to a nonexistent duty was not deficient performance, (2) counsel's failure to advise the inmate that he had the right to an attorney if he chose not to plead guilty could not be said to have evinced deficient performance, (3) his guilty plea petition told him that if he chose not to so plead, he was guaranteed the right to counsel, (4) in any event, the record contradicted the contention that the inmate was not advised of his right to counsel, and (5) as the inmate's plea was voluntarily entered, which included an understanding of the charge and the sentence, the court could not say that counsel was deficient in allowing the inmate to plead guilty. Thompson v. State, 990 So. 2d 265 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because ineffective assistance of counsel was not established; the inmate stated that he was satisfied with his counsel's service and that his attorney had explained the plea petition. He offered no evidence, other than his own allegations, to show that counsel's performance was deficient; moreover, there was no need to contact witnesses to testify as to the inmate's innocence based on his admissions. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Where appellant entered a plea of guilty to grand larceny, he argued that his attor-

ney's misrepresentation about the State's sentencing recommendation constituted ineffective assistance of counsel; however, the trial court gave appellant the opportunity to withdraw the guilty plea after the State made the ten-year recommendation and he declined. Therefore, appellant did not show a reasonable probability that, but for counsel's erroneous advice, he would not have pleaded guilty, but would have insisted on going to trial. Myles v. State, 988 So. 2d 436 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to felony domestic violence — aggravated assault and aggravated assault by use of a deadly weapon, he failed to prove that he received ineffective assistance of counsel in light of counsel's advice to plead guilty and because his attorney failed to argue a self-defense theory. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he suffered any actual prejudice as a result of a deficiency. McComb v. State, 986 So. 2d 1087 (Miss. Ct. App. 2008), writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Defendant did not receive ineffective assistance of counsel where in the petition to enter his guilty plea, defendant clearly acknowledged that his sentence was up to the court and that he could receive zero to ninety years' imprisonment; defendant indicated his satisfaction with his attorney's advice and recognized that if he had been told by his lawyer that he might receive a lighter sentence this was merely a prediction and not binding on the court. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Defendant's trial counsel was not inefficient where defendant neither professed his innocence, nor called attention to the impairment of any defense as a result of not being informed of his ineligibility for parole; trial counsel informed defendant that a conviction for armed robbery carried with it ineligibility for parole. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Trial counsel was not deficient in failing to inform defendant that he could have been charged with carjacking when neither defendant nor his trial counsel had any choice in the matter. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Appellant inmate's ineffective assistance of counsel claim was properly denied because the inmate failed to show that he received deficient advice which prejudiced his defense because, while the inmate argued that his trial counsel failed to explain that he had to surrender himself to authorities on the day he entered his plea, counsel provided competent and reasonable professional assistance during all stages of the guilty plea proceedings, and the mere fact that the inmate was confused about whether he had to surrender himself to authorities as soon as he entered his guilty plea was of no consequence. Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

Defendant's counsel was not ineffective during plea proceedings where the trial judge and defense counsel went to great lengths to lead defendant through the plea process and made sure that defendant's guilty plea to the sale of cocaine was intelligent and voluntary; defendant testified under oath, during the guilty plea, that defendant was satisfied with counsel's representation. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Where appellant entered a guilty plea to conspiracy to commit capital murder, he was not entitled to post-conviction relief based on his ineffective assistance of counsel claim. Appellant admitted his guilt and stated that he was satisfied with the services of his two attorneys; the twenty-year sentence that appellant received was that mandated by the Mississippi Legislature. Payne v. State, 977 So. 2d 1238 (Miss. Ct. App. 2008).

Where an inmate's guilty plea for carrying a concealed weapon was based on the inmate's action of having a pistol under a blanket in a van, counsel was ineffective for allowing the inmate to plead guilty because there was no factual basis for the charge since Miss. Code Ann. § 97-37-1(2) allowed the inmate to possess a concealed firearm or deadly weapon within any mo-

tor vehicle; the inmate failed to establish ineffective assistance based on pleading guilty to being a felon in possession of a deadly weapon because, inter alia, the inmate admitted on the record that the inmate had been convicted of a felony. Knight v. State, 983 So. 2d 348 (Miss. Ct. App. 2008), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), writ of certiorari denied by 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079, 77 U.S.L.W. 3265 (2008).

Where appellant pleaded guilty to two counts of sexual battery, his lawyer was not deficient because he allowed appellant to plead guilty to a faulty indictment which allegedly did not meet the requirements of Miss. Code Ann. § 99-7-9 and Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictments charging defendant with committing sexual battery bore a signature of the grand jury foreman and each was stamped filed on October 20, 2005, by the circuit clerk; three unsigned and unfiled indictments in the case were not cause to grant appellant relief on his ineffective assistance of counsel claim. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, he failed to prove that trial counsel was ineffective for urging him to plead guilty; counsel told him that if he went to trial and was found guilty, he would be sentenced to two consecutive life sentences plus ten years. The fact that appellant pleaded guilty because he feared a harsher sentence did not render his plea involuntary. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

In a post-conviction proceeding, appellant argued that he received ineffective assistance of counsel because his attorney allegedly conspired with the prosecution to force him to plead guilty to the sale of a controlled substance charge. However, appellant failed to support these allegations and stated that he was satisfied with the advice of his attorney during the plea colloquy; the issue was without merit. Davis v. State, 973 So. 2d 1040 (Miss. Ct. App. 2008).

Even though a public defender failed to prepare for a murder case until after an indictment, appellant inmate's request for post-conviction relief based on ineffectiveness of counsel was denied because there was no prejudice shown since the inmate confessed twice to killing the victim. Moreover, the inmate did not show how retained counsel's failure to conduct independent investigation of the evidence and failure to interview witnesses prejudiced the result in this case; at any rate, he stated that he was satisfied with her services during the plea hearing. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Post-conviction relief was denied in a drug case where appellant inmate offered no evidence, other than his own statements, to prove that counsel was ineffective; moreover, he did not meet the second prong of the test in Strickland v. Washington, 466 U.S. 668 (1984), since he did not show that he would not have entered a guilty plea if counsel had informed him of the felony charges against the State's witnesses. In addition, the inmate had stated during the plea process that he was satisfied with his attorney. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Court could not find that appellant's trial counsel performed in an ineffective manner for failing to object to the amendment of an indictment charging appellant as an habitual offender under Miss. Code Ann. § 99-19-83 because it was clear that appellant's counsel was able to negotiate a reduced sentence for appellant, from a possible life sentence under Miss. Code Ann. § 99-19-83 to five years under Miss. Code Ann. § 99-18-81. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

When appellant pleaded guilty to DUI manslaughter and two counts of DUI mayhem, he represented to the court that he was satisfied with counsel's representation; he was not entitled to post-conviction relief based on his claim that counsel was ineffective for failing to assist him in receiving a speedy trial and failing to advise him regarding the maximum and minimum sentences. Appellant failed to present any facts supportive of a speedy trial violation; and he was advised, on the record, of the minimum and maximum

sentence. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

In a case where defendant entered a guilty plea to possession of cocaine, post-conviction relief based on ineffective assistance of counsel was denied because there was nothing to support this other than defendant's own bare assertions; moreover, the record did not demonstrate that defendant was coerced into pleading guilty. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because there was no showing of ineffective assistance of counsel where defense counsel fulfilled his duty by advising defendant to plead guilty after viewing a tape of the drug transaction; moreover, defendant was unable to show that the outcome would have been different if counsel had investigated and found out that defendant had a prior felony conviction. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

Post-conviction motion should not have been summarily dismissed under Miss. Code Ann. § 99-39-11 where defendant entered a guilty plea to kidnapping and received 20 years in prison because, although the plea was facially correct, the evidence presented by defendant indicated that his attorney misrepresented the sentence as probation, and this was a proper attack on the voluntariness of the plea and formed the basis for an ineffective assistance of counsel claim; however, ineffective assistance of counsel was not shown regarding the attorney's representation that a victim was unable to testify at the plea hearing on the issue of guilt nocence or based on an incomplete transcript since no prejudice was shown. Mitchener v. State, 964 So. 2d 1188 (Miss. Ct. App. 2007).

Where defendant claimed that a plea agreement he entered into was coerced and that counsel was ineffective in not objecting to the trial court's sentence, defendant's motion for postconviction relief was properly denied because there was no evidence that defendant fulfilled his obligation, as he was required to do according to the plea agreement. Brown v. State, 963 So. 2d 577 (Miss. Ct. App. 2007).

Where appellant was convicted of selling methamphetamine by entering a plea of guilty, appellant's claim that his counsel failed to interview witnesses did not include which witnesses were not interviewed or any possible exculpatory testimony they would have provided; thus, appellant failed to meet the required burden of showing that counsel was deficient or that defendant was prejudiced by counsel's deficiency. Carroll v. State, 963 So. 2d 44 (Miss. Ct. App. 2007).

Motion for postconviction relief was properly dismissed without an evidentiary hearing in a case where a guilty plea was entered to the charge of burglary of an occupied dwelling because defendant offered no proof of what advice he was given about parole, other than the assertions made in the motion, and he was not eligible for such due to his conviction; also, defendant was told by a trial court that he was required to serve the full term of his sentence when he entered a guilty plea. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Denial of the inmate's motion for post-conviction relief was proper in part because he failed to show the ineffective assistance of counsel, as there was no proof that his attorney did not explain the charges to him; to the contrary, the inmate twice swore under oath that his attorney explained the charges to him and that he understood them. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel by the failure to inform him of an amended sentence under Miss. Code Ann. § 97-21-33 because he was unable to show that he would have chosen to proceed to trial if he had been informed of such; defendant received a very favorable plea agreement under either sentencing scheme, and therefore it was unlikely that the outcome of the case would have been different. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Defendant had not established that he was entitled to post-conviction relief for ineffective assistance of counsel when defendant entered a plea of guilty to the sale of cocaine; counsel was not required to apprise defendant of a defective indictment because the indictment was not defective even though it did not set forth the price and quantity of cocaine sold, and counsel properly advised defendant that he could be facing a statutory sentence of 30 years for the sale of cocaine. Dunlap v. State, 956 So. 2d 1088 (Miss. Ct. App. 2007).

Defendant had not established a claim for ineffective assistance of counsel when he claimed that the attorney assured him he would receive a sentence similar to the one imposed on his co-defendants if he entered a plea of guilty, because the record showed that during the plea proceedings defendant indicated on the record that he had not been promised anything and that he understood that the sentencing was entirely up to the trial court judge. Addison v. State, 957 So. 2d 1039 (Miss. Ct. App. 2007).

In an action in which appellant appealed from a judgment of the Calhoun county circuit court which denied his petition for post-conviction relief, the judgment was affirmed where appellant's counsel did not provide ineffective assistance; through various letters and conferences, appellant's counsel advised him that at trial the state could probably get a conviction, and appellant would potentially face five years' imprisonment, while the judge may be more lenient with a plea. Cougle v. State, 966 So. 2d 827 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he was unable to show that counsel acted deficiently in the context of a plea when defendant received the exact sentence that he bargained for. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

In a case where defendant pled guilty to statutory rape, and the suspended portion of his split sentence was later revoked, there was no evidence that counsel acted deficient when a guilty plea was entered, and defendant expressed satisfaction with his counsel when he entered a plea and when he was released from incarceration; there was no evidence in the record of involuntariness or ignorance on the part of defendant in signing the plea agreement. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

In a case where defendant entered a guilty plea to two drug charges, no ineffective assistance of counsel was shown where he received a 17-year sentence instead of a life sentence required for habitual offenders; the attorney's advice to plead guilty was reasonable, and he raised every credible pre-trial motion and was prepared to go forward with the case. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Dismissal of a petition for post-conviction relief was reversed and remanded for an evidentiary hearing because defendant made a prima facie showing that his attorney was deficient in recommending a plea to a weapons charge since there was no probable cause to stop a car where one taillight was working under Miss. Code Ann. § 63-7-13; however, there was no ineffective assistance of counsel shown based on a failure to explain an Alford plea or the failure to investigate. Moore v. State, 986 So. 2d 959 (Miss. Ct. App. 2007), reversed by 986 So. 2d 928, 2008 Miss. LEXIS 326 (Miss. 2008).

Post-conviction relief was denied in a case where a guilty plea was entered to the charge of sexual battery because there was no ineffective assistance of counsel; defendant indicated at his plea hearing that he was satisfied with the attorney's investigation of the case, the attorney was not deficient in advising defendant that he would probably not prevail at trial due to the confession, defendant never told the attorney that there was anything wrong with the confession, and the attorney was not deficient for failing to file an appeal since this right was waived by the guilty plea. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant entered a guilty plea to the charge of burglary of a dwelling because there was no ineffective assistance of counsel shown; defendant stated that he was not forced to give the

plea, he indicated that he was satisfied with counsel's performance, and there was nothing to show that defendant was surprised by the plea proceedings, despite having a short amount of time to make a decision regarding the plea offer. Young v. State, 952 So. 2d 1031 (Miss. Ct. App. 2007).

In a case where defendant pled guilty to the sale of cocaine, post-conviction relief was denied because he did not show that he received ineffective assistance of counsel, and defense counsel properly informed defendant that he could have received the death penalty if he did not take the plea offer; moreover, even if defendant showed that the first prong of the ineffective assistance of counsel test was met, he did not allege that any imagined deficiency caused him prejudice. Belton v. State, 968 So. 2d 501 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 643 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel in a statutory rape case where a guilty plea was entered; defendant was fully informed of the facts and circumstances surrounding his case, and he admitted that he was satisfied with his attorney's actions during the plea hearing. Plummer v. State, 966 So. 2d 186 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 553 (Miss. 2007).

Request for post-conviction relief was properly denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) where the record contradicted a claim that counsel mistakenly informed defendant about the charge he was pleading guilty to, a claim of coercion, and a claim of ineffective assistance of counsel; the case number was in the heading of the document, defendant acknowledged an intent to nolle prosse a remaining charge, and the parties took notice of this agreement at the plea hearing. Hoyt v. State, 952 So. 2d 1016 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant entered a guilty plea to sexual offenses because he did not receive ineffective assistance of counsel; the decision to submit him to a mental evaluation prior to the entry of a plea rested with the judge, there was no failure to investigate or interview witnesses where the information was provided to the defense, the information provided did not rise to the level of exculpatory evidence, and defense counsel did not misrepresent the sentence to defendant's parents. McNeal v. State, 951 So. 2d 615 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was properly denied because he did not receive ineffective assistance of counsel during a guilty plea; there was no duty to investigate for defects in a proper indictment where no error was found in the fact that the instrument bore a grand jury date preceding the indictment's filing date, defendant did not give an adequate argument regarding which rights the attorney failed to advise him of, and it was merely trial strategy to fail to object to a statement from the victim's family at sentencing. Adams v. State, 950 So. 2d 259 (Miss. Ct. App. 2007).

Post-conviction relief was denied because defendant was unable to show that she received ineffective assistance of counsel in entering a guilty plea; an allegation that the attorney did not explain the charges or possible sentences adequately contradicted the sworn statements defendant gave during a guilty plea. Jones v. State, 948 So. 2d 499 (Miss. Ct. App. 2007).

Post-conviction relief was denied because two defendants were unable to show that they received ineffective assistance of counsel based on advice given about leniency promises allegedly made by police prior to their confessions; because there was no evidence that the statements allegedly made had anything to do with their confessions, the promises were not the proximate cause of such, and moreover defendants did not indicate that they were disappointed with counsel during the plea hearing. Holland v. State, 956 So. 2d 322 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief, filed after he pled guilty to two counts of murder, was properly dismissed without a hearing where counsel's advice that a trial could result in a guilty verdict and the death penalty did not support an argument of ineffectiveness; counsel had a

duty to inform defendant of the possible outcomes of conviction. Booker v. State, 954 So. 2d 448 (Miss. Ct. App. 2006).

Trial court did not err under Miss. Code Ann. § 99-39-11(2) in denying petitioner an evidentiary hearing on his post-conviction petition because there was no evidence in the record other than his bald assertions that counsel performed inadequately; defendant's testimony at his sentencing hearing did not indicate any confusion as to the result of his guilty plea, and it also did not indicate any dissatisfaction with counsel. Knight v. State, — So. 2d —, 2006 Miss. App. LEXIS 808 (Miss. Ct. App. Oct. 31, 2006), opinion withdrawn by, substituted opinion at, modified by 983 So. 2d 348, 2008 Miss. App. LEXIS 145 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where defendant pled guilty to two counts of armed robbery, in violation of Miss. Code Ann. § 97-3-79, because his attorney did not give erroneous advice since a life sentence was a possible sentence if a jury had convicted him of both counts; the record showed that defendant actively participated in the robbery, and he knew that people were going to be robbed. Wortham v. State, 952 So. 2d 968 (Miss. Ct. App. 2006).

Defendant raised a claim of ineffective assistance of counsel which required a full evidentiary hearing where there was evidence that the victim's girlfriend poured boiling water on him, along with defendant's testimony that someone else committed this act, which was enough to raise a reasonable doubt that defendant committed the offense; this evidence may have changed the outcome had the parties gone forward. Hannah v. State, 943 So. 2d 20 (Miss. 2006).

Appellate court held the inmate was not deprived of effective assistance of counsel as the attorney helped reduce the outstanding charges against defendant. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Counsel was not ineffective for failing to investigate the police informant because, had defendant not pleaded guilty and gone to trial, the informant's background would have been relevant only for impeachment purposes, and in his petition to enter a guilty plea, defendant swore that his attorney had counseled him and advised him about the nature of the charge and all possible defenses. Deloach v. State, 937 So. 2d 1010 (Miss. Ct. App. 2006).

In a case involving a plea to the charge of gratification of lust, ineffective assistance of counsel was not shown where defendant only brought forth the unsworn allegations in his brief and the report of a doctor who examined a victim; he did not show that the attorney failed to investigate this evidence, explain how he obtained the information, or show that the attorney would have varied his course at trial. Knight v. State, 956 So. 2d 264 (Miss. Ct. App. 2006), substituted opinion at 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App. 2007).

Appellate court denied an inmate's motion for post-conviction relief because the inmate acknowledged at his plea hearing that his attorney was fully informed as to all of the facts and circumstances surrounding his case. Hill v. State, 935 So. 2d 416 (Miss. Ct. App. 2006), writ of certiorari dismissed by 942 So. 2d 164, 2006 Miss. LEXIS 766 (Miss. 2006).

Since an inmate was unable to show that he was prejudiced by an attorney's failure to subpoena a witness in a plea negotiation, a claim of ineffective assistance of counsel failed in a petition seeking post-conviction relief. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. § 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such, a claim of ineffective assistance of counsel failed. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Defendant was not denied effective assistance of counsel as the record showed that defendant informed the court that he had discussed with his counsel all facts and circumstances relating to the crimes with which he was charged, and all elements of the crime and all facts that might

aid in his defense. Brown v. State, 935 So. 2d 1122 (Miss. Ct. App. 2006).

Where appellant pled guilty to armed robbery, he was adequately advised by counsel as to his guilty plea and the record indicated that he said his attorney had discussed all the elements of the crime with him; in post-conviction proceedings, the court rejected his claim that he was not afforded the effective assistance of counsel. Ellis v. State, 952 So. 2d 251 (Miss. Ct. App. 2006).

Petition for post-conviction relief was denied without an evidentiary hearing where a plea was entered to armed robbery because, despite counsel's failure to investigate the type of weapon actually used, no prejudice resulted since an inmate failed to show that he would have proceeded to trial. Hinton v. State, 947 So. 2d 979 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 94 (Miss. 2007).

Appellate court found no merit to appellant's claims that his attorney deceived him into believing that he would receive a lighter sentence if he pled guilty, and that his attorney instructed him to lie to the trial court by stating that he had not been promised anything in return for his guilty plea where appellant had told the trial court that his plea was voluntary and that he was satisified with the assistance of his attorney. Jones v. State, 962 So. 2d 571 (Miss. Ct. App. 2006).

Colloquy between defendant and the court showed the lack of merit in his claim that counsel was ineffective. During his plea colloquy, defendant stated that he was satisfied with the advice of his counsel and stated that his counsel had fully and completely explained the charges that he was facing and any defenses that he would have; nothing in the record indicated that defendant's counsel was deficient in any way, and defendant stated specifically that no one, including his attorney, had induced or coerced him into making his plea. Strohm v. State, 923 So. 2d 1055 (Miss. Ct. App. 2006).

Trial court properly denied defendant's motion for postconviction relief after he pled guilty to armed robbery because he stated in his plea colloquy that he had not been coerced into pleading guilty and that he was satisfied with the advice of his attorney. Counsel's advice that defendant plead guilty was clearly within the range of competence demanded of attorneys in criminal cases. Williams v. State, 922 So. 2d 853 (Miss. Ct. App. 2006).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine because there was nothing in the record to overcome the presumption that defendant received effective assistance of counsel, as defendant acknowledged under oath in his petition to enter a plea of guilty that his lawyer did all that anyone could do to counsel and assist him, and that he was satisfied with the advice and help that he received. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Any advice by counsel that defendant would be eligible for parole was incorrect and constituted deficient performance, and having shown deficient performance, defendant had to prove that he would not have pled guilty but for the incorrect advice; if his attorney improperly advised him of his eligibility for parole, defendant was entitled to a hearing to investigate his claim that he would not have pled guilty but for the incorrect advice. Garner v. State, 928 So. 2d 911 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 252 (Miss. 2006), writ of certiorari denied by 549 U.S. 1060, 127 S. Ct. 677, 166 L. Ed. 2d 528, 2006 U.S. LEXIS 9138, 75 U.S.L.W. 3283 (2006), remanded by 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault and possession of a firearm by a felon, his attorney told him that he would receive life without parole if he went to trial; defendant then entered a plea of guilty to aggravated assault. Because his attorney's advice was correct, defendant was afforded effective assistance of counsel. Brewer v. State, 920 So. 2d 546 (Miss. Ct. App. 2006).

Defendant did not receive ineffective assistance of counsel where, when questioned by the trial judge as to whether he understood that he was entering into an Alford appeal, and if he understood its consequences, defendant answered affir-

matively; defendant also answered affirmatively when asked if defendant understood the minimum and maximum sentences for the crimes to which he was pleading; it was clear that defendant was not entitled to relief and the trial court was correct in refusing to grant an evidentiary hearing. Cole v. State, 918 So. 2d 890 (Miss. Ct. App. 2006), writ of certiorari dismissed by 927 So. 2d 750, 2006 Miss. LEXIS 213 (Miss. 2006).

Defendant did not carry his burden of proving that ineffective assistance of counsel led him to plead guilty to armed robbery when he otherwise would have asserted his innocence where defendant, in open court, had responded during his plea allocution that he was satisfied with the legal advice and services of his attorney. At no point in his plea of guilty and sentencing did defendant assert his innocence. Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of the inmate's petition; the inmate was unable to show that but for the ineffective assistance of counsel he would not have pled guilty because the inmate stated that he was pleased with his counsel's representation at the plea hearing. Further, the inmate's counsel had the armed robbery charge reduced to simple robbery. Ivy v. State, 918 So. 2d 84 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate did not establish that he was deprived of effective assistance of counsel during his plea hearing, because his mother and his sister testified that the inmate's attorney had told him that he would be pleading guilty to simple assault and would be sentenced to time served, and that testimony directly contradicted the inmate's testimony at the actual plea hearing where he acknowledged that he was pleading guilty to aggravated assault. Riggs v. State, 912 So. 2d 162 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief on the basis that the inmate claimed that he was denied effective assistance of counsel while securing a guilty plea, as the inmate did not present any facts supporting that claim. Ford v. State, 911 So. 2d 1007 (Miss. Ct. App. 2005).

Denial of an inmate's motion for post-conviction relief was affirmed as the inmate's claim that his guilty plea was not knowing and voluntary due to his counsel's alleged deficient performance was contradicted by the inmate's statements at the plea hearing that he understood the consequences of his plea and was satisfied with his counsel's performance. Gonzales v. State, 915 So. 2d 1108 (Miss. Ct. App. 2005).

Inmate failed to establish his claims that he was deprived of effective assistance of counsel because he was persuaded to plead guilty, and that his guilty plea was involuntary and was entered after being ill advised by his counsel, as his counsel was obligated to advise him that the potential consequences of trial and conviction of both counts could be a maximum of 120 years imprisonment, and the inmate acknowledged that he had been informed that a guilty plea would waive his right to a public and speedy trial by jury, his right to confront adverse witnesses, and his right to protection against self incrimination. Epps v. State, 926 So. 2d 242 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate provided nothing more than his own affidavit to establish that he was deprived of effective assistance of counsel and did not allege that had it not been for his counsel's alleged ineffectiveness that he would not have pled guilty. Covington v. State, 909 So. 2d 160 (Miss. Ct. App. 2005).

By entering a guilty plea to manslaughter, defendant did confess to the circuit court that he killed the victim under circumstances in which he was not defending himself. As such, when his counsel informed him that he could plead manslaughter, counsel did exactly what defendant said his counsel failed to do (inform him that he could plead "not in necessary self-defense"); in any event, if defendant had proceeded to trial, it was possible that he could have been convicted of murder and sentenced to life imprisonment, and counsel was not ineffective in advising defendant as to a plea to manslaughter. Barnes v. State, 920 So. 2d 1019 (Miss. Ct. App. 2005), writ of certiorari dismissed by

920 So. 2d 1008, 2005 Miss. LEXIS 602 (Miss. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 761 (Miss. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 79 (Miss. 2006).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery. He told the judge that he had discussed the facts of the case with his attorney and his course of action; defendant's ineffective assistance of counsel claim lacked merit. Baldwin v. State, 923 So. 2d 218 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 141 (Miss. 2006).

Defendant failed to prove that his counsel had provided ineffective assistance in violation of the Sixth Amendment because, if defendant had remained dissatisfied after going to confer with his counsel before entering his guilty plea, he would have told the court, since he had done so before and the court had provided him with ample opportunities to say something. However, when he came back to the court and entered his guilty plea he testified that he was satisfied with his counsel. Jones v. State, 915 So. 2d 511 (Miss. Ct. App. 2005).

Where defendant stated that he was satisfied with his counsel's representation and his counsel had not pressured him into pleading guilty, the trial court found that his ineffective assistance of counsel claims were waived by his guilty plea, and where defendant was facing a life sentence and received a seven-year incarcerative term, he failed to prove his claim of ineffective assistance of counsel. Smith v. State, 928 So. 2d 190 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 237 (Miss. 2006), writ of certiorari denied by 549 U.S. 894, 127 S. Ct. 202, 166 L. Ed. 2d 164, 2006 U.S. LEXIS 5463, 75 U.S.L.W. 3170 (2006).

Appellant did not receive ineffective assistance of counsel that rendered her plea involuntary when her counsel allegedly told her that she would receive a more lenient sentence by pleading guilty as the trial judge informed her during a colloquy at the plea hearing of the appropriate sentencing range associated with her plea and appellant stated that she understood. Smith v. State, 919 So. 2d 989 (Miss. Ct. App. 2005).

147. — — Jury selection, ineffectiveness of counsel.

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, it could not be assumed that certain jurors failed to respond to a direct question during voir dire; furthermore, there was no evidence that the attorney orchestrated the situation of defendant entering the courtroom carrying a small child since it was entirely possible that defendant himself, independent of any direction from his attorney, decided to bring the baby into the courtroom. Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Defendant's conviction for felony child abuse was appropriate because he failed to prove that he received the ineffective assistance of counsel. In part, defendant's claims that his attorney incorrectly informed him that the maximum penalty for felony child abuse was 20 years instead of the correct maximum sentence, which was life in prison, was without merit; the statement made to the jury during voir dire did not say that 20 years was the maximum penalty for felony child abuse but instead merely suggested to the jury the possibility that defendant could go to prison for 20 years, which was a valid possibility under Miss. Code Ann. § 97-5-39(2)(a). Henry v. State, 40 So. 3d 621 (Miss. Ct. App. 2010).

Trial court properly denied defendant's motion for post-conviction relief where defendant was not entitled to a jury of any particular racial composition; therefore, defendant could not show that counsel was deficient in failing to object to an all-white jury. It was impossible to prove that counsel's objection to the jury composition would have created a different result if no original verdict was reached. Shumpert v. State, 983 So. 2d 1074 (Miss. Ct. App. 2008).

Defendant alleged that defendant was prejudiced because a juror was thought to be a blood relative of the victim's mother, but the juror in question and the victim's

mother testified that they were not related and defendant failed to show that the juror and the victim's mother were close; thus, defendant's counsel was not ineffective because: (1) defendant failed to put forth any proof that counsel's failure to object to the juror was not a strategic move; and (2) the defendant showed no prejudice. Scott v. State, 965 So. 2d 758 (Miss. Ct. App. 2007).

No evidence was presented to indicate that any jurors with law enforcement connections were anything other than fair and impartial; in the face of the jurors' statements that they would be fair and impartial, defendant's attorney did not err in not challenging the jurors for cause or in not using peremptory strikes against them. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In a case where defendant was convicted of several crimes relating to the arson and burglary of a residence, he failed to show that he received ineffective assistance of counsel at trial; he failed to show that defense counsel had a duty to strike a juror that was a distant relative of the victims, and there was no showing of bias. McCollins v. State, 952 So. 2d 305 (Miss. Ct. App. 2007).

148. — — Conduct of trial, ineffectiveness of counsel.

In defendant's felony child abuse case under Miss. Code Ann. § 97-5-39(2)(a), counsel was attempting to prevent the jury from hearing any more testimony about the lingering effects of the child's injuries by stipulating as to the child's condition; the court could not find this action deficient. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

In a carjacking case, even though an indictment and a jury instruction lacked the specific language "from another person's immediate actual possession," as set forth in Miss. Code Ann. § 97-3-117(1), they were sufficient because the use of the name of the victim was the equivalent of such. Therefore, there was no due process violation, and defense counsel was not ineffective for submitting the instruction to the jury. Perryman v. State, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

In a possible hybrid representation case, defendant's ineffective assistance of counsel claim failed because there was no support in the record for defendant's allegations that counsel was unprepared for trial or that he made disparaging remarks to defendant during the trial. Jackson v. State, 1 So. 3d 921 (Miss. Ct. App. 2008).

In appellant's capital murder case, counsel was not ineffective for failing to adequately investigate and present the motion to transfer venue because counsel filed a motion to change venue and supported that motion with numerous affidavits and all known relevant press documentation. The trial court held a hearing and determined that a fair trial could be held in Union County. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Defendant's retained counsel was not ineffective in informing the jury that defendant was a habitual offender where that information was included in the indictment. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Where defendant was convicted of armed robbery, kidnapping, and rape, the record was not sufficiently developed to support his claim that counsel rendered ineffective assistance by failing to: properly investigate the case, call additional witnesses, request a continuance for additional time to prepare, file a motion asserting defendant's right to a speedy trial, file a motion to suppress the 911 tape, or call a DNA expert to rebut the State's DNA evidence. Defendant did not mention which witnesses his attorney failed to contact; since defendant alleged that his attorney should have requested more time to prepare for trial, it was unclear how he was prejudiced by his attorney's failure to request a speedy trial. Burton v. State, 970 So. 2d 229 (Miss. Ct. App. 2007).

In a drug case, defendant did not receive ineffective assistance of counsel because (1) he offered no evidence to rebut the presumption that the jury had been properly sworn, so no objection by counsel was required; (2) defense counsel was not required to request an instruction regard-

ing an accomplice because the State's evidence did not rest upon the testimony of two others involved; (3) defense counsel's failure to request an additional instruction when mention was made of defendant's prior incarceration was not deficient where an objection was made immediately and a curative instruction was given; and (4) the failure to object to defendant's criminal record was not deficient since the testimony of a correctional department custodian was permissible to authenticate such under Miss. R. Evid. 901. Vardaman v. State, 966 So. 2d 885 (Miss. Ct. App. 2007).

Record did not affirmatively show ineffective assistance of counsel of constitutional dimensions where a very thorough motion for pre-trial discovery was in fact made, and defendant failed to identify any witnesses who should have been interviewed or whose testimony would have strengthened his defense; defendant identified no aspect of his attorney's performance that suggested a failure to investigate the circumstances and law surrounding his case, and the sentence defendant received was in accord with the applicable statutes. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Defendant's counsel filed numerous pretrial motions, including his successful motion to offer evidence of the first victim's past sexual behavior, presented numerous witnesses for the defense, and succeeded in having count two of the indictment dismissed; thus, defendant's ineffective assistance of counsel claim failed. Poynor v. State, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Counsel was not ineffective for failing to object to: (1) the confidential informant's narration of a videotape of a controlled drug buy was proper as he testified to matters he perceived first-hand; (2) a prosecutor's statement during voir dire because he did not elaborate on how the statement was improper or prejudiced the outcome of his trial; and (3) the prosecutor's improper remarks during closing argument because, even though counsel should have objected to the remarks, defendant was not prejudiced by counsel's failure to object since the jury would have still found him guilty. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

Defendant failed to allege any prejudice stemming from an admission by trial counsel that defendant was a habitual offender as the statement was made outside the presence of the jury, with only opposing counsel, the judge, and court staff present; also, since defendant was sentenced to a mandatory term of life as a habitual offender, the remarks made to the court had no impact on the result of defendant's trial, and thus defendant's counsel was not ineffective. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In a case involving capital murder and aggravated assault, defendant did not receive ineffective assistance of counsel based on a failure to interview a potential alibi witness, a failure to have gun powder residue tests performed, or the failure to object to the prosecutor's use of a nickname for defendant; defendant did not identify the alibi witness or the substance of the potential testimony, a negative gun powder residue test would not have conclusively proven defendant's innocence, and an objection to the prosecutor's remark was overruled. Sanders v. State, 939 So. 2d 842 (Miss. Ct. App. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because his counsel were not ineffective; after appointment, counsel began their defense with a vigorous volley of motions and his attorneys were able to secure a plea bargain that relieved him of a possible death sentence. Harris v. State, 944 So. 2d 900 (Miss. Ct. App. 2006).

Defendant failed to show that his trial counsel was ineffective because (1) a circumstantial evidence instruction would not have been proper under the facts of the case, and the failure of trial counsel to request such an instruction was not error; (2) the failure of counsel to object to the prior statement of an alleged accomplice as hearsay was not error because the trial court properly allowed the former statement of the accomplice to be used for impeachment, and any objection to hearsay by trial counsel would not have resulted in any change in the outcome; and

(3) trial counsel did not err in not requesting a lesser-included offense instruction of receiving stolen property because his theory and defense were that the State did not prove its case, and an all or nothing — guilty or acquittal — trial strategy was proper. Long v. State, 934 So. 2d 313 (Miss. Ct. App. 2006), writ of certiorari dismissed by 939 So. 2d 805, 2006 Miss. LEXIS 610 (Miss. 2006).

In a capital murder case, an inmate's ineffective assistance of counsel claims were either procedurally barred, or, even if not procedurally barred, were without merit, under the following circumstances: (1) the inmate's counsel did not fail to adequately develop evidence to impeach a witness because counsel conducted a thorough cross-examination of the witness, and pursued a line of questioning attempting to call into doubt whether the witness could really have overheard a conversation in which the inmate stated that he sold the guns on the street; (2) counsel's representation of another witness in a prior action that was completely unrelated to the inmate's case was not a conflict of interest, and counsel conducted a full cross-examination of the witness; (3) counsel produced several witnesses placing the inmate at a nightclub on the night of the murders; (4) counsel did present a case in mitigation for the jury to consider; (5) counsel's closing argument was coherent and not a poor strategic choice; and (6) the prosecutor's arguments using scriptural, religious, or biblical references were proper because the prosecutor was responding to scriptural or religious arguments made by defense counsel. Manning v. State, 929 So. 2d 885 (Miss. 2006).

In an ineffective assistance of counsel claim, defendant pointed to his trial counsel's failure to object to leading questions, failure to object to jury instructions containing assumptions of fact, failure to effectively cross-examine, failure to adequately investigate his case, failure to call witnesses, and numerous other grounds; however, defendant's trial counsel was not ineffective based on the record. Any errors defendant's trial counsel might have committed in the case were not prejudicial to the defense so as to create a reasonable probability of a different outcome in the absence of such errors; thus, defendant's ineffective assistance of counsel claim failed. Moore v. State, 938 So. 2d 1254 (Miss. Ct. App. 2006), writ of certiorari denied by 2006 Miss. LEXIS 750 (Miss. Oct. 5, 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 749 (Miss. 2006).

Defendant alleged that he was denied his constitutional right to effective assistance of counsel, but the aid given by defendant's trial counsel was effective and presented no basis for reversal on appeal because (1) the testimony at trial clearly indicated that the victim's body had been moved and that any knife which might have been at the crime scene was not found until later; (2) during cross-examination, defendant's counsel strongly questioned law enforcement as to how thorough their search and investigation of the scene was; (3) defendant failed utterly to demonstrate that character witnesses would have changed the outcome in his case, and he presented no evidence indicating that the failure to call character witnesses prejudiced his defense; (4) counsel's decision, not to ask that the jury be allowed to view the crime scene, fell within the ambit of reasonable trial strategy; (5) the decision of trial counsel to not discuss any violent incidents of the victim could very well have been predicated upon the fact that any violent propensities of defendant could then be brought out by the State; and (6) it was unclear from defendant's argument what other evidence he would have had his counsel present regarding his self-defense claim. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

149. — — Examination of witnesses, ineffectiveness of counsel.

Statement made by a detective concerning what doctors told him was hearsay under Miss. R. Evid. 801(c), but defendant failed to show how counsel's failure to object prejudiced his defense. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court was not persuaded that a detective was offering any medical conclusion

that only an expert could give; thus, the court could not find that defendant's trial counsel was ineffective for failing to object to the first statement. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Court rejected defendant's claim of ineffective assistance of counsel; the court failed to see how a question posed to the State's expert to discuss the type of wound inflicted showed deficient performance, much less any prejudice. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Trial court properly denied defendant's motion for postconviction relief after defendant was convicted of child molestation because it was not evident that, but for counsel's decision to abstain from using defendant's sister or her husband as witnesses, the outcome of the trial would have been different or that counsel's decisions stemmed from anything other than strategy. Didon v. State, 7 So. 3d 978 (Miss. Ct. App. 2009).

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

In appellant's capital murder case, counsel was not ineffective for failing to obtain the State's witness's criminal history because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, the witness was examined thoroughly and extensively about his identification of appellant and about the lighting and other visibility factors. Howell v. State, 989 So. 2d 372 (Miss. 2008).

There was no merit to defendant's ineffective assistance of counsel claim, which seemed to suggest that his attorney was ineffective for failing to ask certain questions, because defendant failed to assert any authority to support his claim that his attorney's actions or inactions rose to the level of ineffective assistance, and defendant did not enunciate the questions that he claimed his attorney was ineffective for failing to ask. Weeks v. State, 971 So. 2d 645 (Miss. Ct. App. 2007).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

Defendant's conviction for burglary of a business was appropriate in part because the record was insufficient to resolve defendant's claim that his attorney was ineffective for not reviewing a surveillance video prior to cross-examining any of the prosecution's first three witnesses; the record's state rendered it impossible for the appellate court to examine defendant's allegations. Turner v. State, 962 So. 2d 691 (Miss. Ct. App. 2007), writ of certiorari dismissed by 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

In a drug case, even though defendant alleged that counsel was ineffective by failing to attack certain testimony, by not eliciting certain testimony from the driver of a car where drugs were found, and by failing to impeach this witness for his role in selling drugs, there was no showing of prejudice; therefore, there was constitutionally adequate representation. Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 419 (Miss. 2007).

Defendant did not receive ineffective assistance of counsel during his trial for breaking and entering; counsel was not deficient in failing to subpoena two of the State's witnesses who did not even testify at trial against defendant. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Leading questions rarely create so distorted an evidentiary presentation as to deny a defendant a fair trial; thus, defendant's claim that his attorney was ineffective by allowing the district attorney to ask a series of leading questions to the witness failed. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

150. — — Objection to admission or suppression of evidence, ineffectiveness of counsel.

Defendant's convictions for aggravated assault and murder were appropriate because he failed to prove that he received the ineffective assistance of counsel since the failure to object to part of an officer's testimony did not meet the requirements of Strickland. Defendant's result would not have changed if his attorney had objected to the testimony; three eyewitnesses identified defendant in court as the only shooter and the evidence was more than sufficient to convict him of the charged crimes. Jackson v. State, 28 So. 3d 638 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the probative value of that evidence, connecting defendant and the murder weapons, was not substantially outweighed by any prejudicial effect given the totality of the evidence. As such, trial counsel's failure to object did not constitute deficient performance. Williams v. State, 3 So. 3d 105 (Miss. 2009).

Defendant's counsel was not ineffective for failing to object to the constructive amendment of the indictment and for failing to meet the notice requirements of Miss. R. Evid. 412(c) necessary to introduce evidence of the victim's prior sexual relationship with defendant because those assignments of error were without merit regardless of the procedural bar imposed. Goldman v. State, 9 So. 3d 394 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Defense counsel was not ineffective for failing to object to defendant's statements that he made to law enforcement being entered into evidence where defendant's statements consisted of his version of an alleged sexual battery incident as well as two prior interactions with the victim; the statements supported defendant's theory of the case, namely that he was looking for a dog on the bed and touched the seven-year-old victim accidentally. McClure v. State, 941 So. 2d 896 (Miss. Ct. App. 2006).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defendant's sentence was proper where his counsel was not ineffective for a failure to object because the certified copy of defendant's conviction and the testimony provided proved that convicted of a crime in Louisiana and that he served a term of more than one year. Holloway v. State, 914 So. 2d 817 (Miss. Ct. App. 2005).

Defendant's claim of ineffective assistance of counsel was dismissed without prejudice because defendant had not alleged that the result at trial would have been different if her counsel had made objections to the prosecutor's inflammatory remarks, the introduction of criminal files on defendant and her son, and the introduction of other guns found in her

home. Her counsel's failure to object could have been viewed as trial strategy and the record did not affirmatively show that her counsel was constitutionally ineffective. Young v. State, 908 So. 2d 819 (Miss. Ct. App. 2005).

151. — — Objection to jury instructions, ineffectiveness of counsel.

Defendant's trial attorney was not ineffective for failing to object to the court's jury instruction; the instruction fairly announced the law applicable to the facts presented and therefore there was no basis for the attorney to object. Perkins v. State, 37 So. 3d 656 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 321 (Miss. 2010).

Appellant failed to show that his trial attorney was ineffective for failing to request a jury instruction presenting the appellant's theory of the case, namely that he had sold sheet rock and not cocaine to the informant; failure to request such an instruction have been a conscious trial strategy, since the attorney may not have wanted the jury to have the option of convicting him of the lesser non-included offese of selling sheet rock under the guise of cocaine. Because the court could not conclude from the record that appellant's attorney had been constitutionally ineffective, the court refrained from rulling upon the claim without prejudice against appellant raising it at a later proceeding. Perkins v. State, 37 So. 3d 656 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 321 (Miss. 2010).

Because there was no reason to assume the trial court delivered an instruction which influenced the jury's guilty verdict, it would not be objectively unreasonable for appellate counsel to fail to raise the issue on appeal. Thus, the inmate's ineffective-assistance claim or appeal would fail under the first prong of Strickland. Tyler v. State, 19 So. 3d 663 (Miss. 2009).

In defendant's trial under Miss. Code Ann. § 97-5-39(2)(a), defendant did admit to shaking the child and his admission to an important element of the crime negated the need for a circumstantial-evidence instruction, such that counsel was not ineffective for failing to proffer such an instruction. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Defense counsel was not ineffective for not objecting to a jury instruction, which contained language that differed from the language of the indictment, because the instruction did not accuse defendant of any other separate or distinct crime other than that of the indictment, nor did it refer to facts of which defendant had no notice; the variance was not material. Nix v. State, 8 So. 3d 141 (Miss. 2009).

Defendant failed to present a prima facie demonstration of ineffective assistance of counsel where there was no indication that the jury would return a verdict of "not guilty" had the jury instruction contained the cumulative language defendant suggested; the jury understood that it was to remain suspicious of the witness's testimony and to weigh it with care. Dear v. State, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

152. — — Continuances, ineffectiveness of counsel.

Court rejected defendant's claim of ineffective assistance of counsel, given that the court failed to see how asking for a continuance constituted deficient performance in this instance, plus defendant failed to show prejudice. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Defendant did not assert on appeal that the other person present during the controlled drug buy would have been able to provide any more information, nor did he suggest how a continuance would have benefitted his defense; therefore, any deficiency on the part of trial counsel for failing to request a continuance did not rise to the level of ineffective assistance, as defendant did not show any prejudice. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

153. — — Sentencing proceedings, ineffectiveness of counsel.

Where the trial court granted appellant's motion to reconsider his sentence

and suspended ten years of his twenty-year sentence for manslaughter, appellant failed to show how counsel was ineffective. The post-conviction court determined that his ineffective assistance of counsel claim lacked merit. Steele v. State, 991 So. 2d 176 (Miss. Ct. App. 2008).

Where defendant was convicted of three counts of sexual battery, the trial court did not err by not declaring a mistrial based upon a deterioration of the attorney/client relationship during sentencing. Several witnesses were called by the defense attorney during sentencing to testify as to defendant's character including his wife, grandmother, mother, and his stepfather. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

In a business burglary case, denial of post-conviction relief was proper because, although Miss. Code Ann. § 47-7-33 limited the power of the trial court to suspend a sentence and order probation for previously convicted felons, any error in sentencing the petitioner was harmless as he was given a lenient sentence; he was indicted as a habitual offender with two prior felonies, but he was ultimately sentenced as a non-habitual offender. The petitioner's counsel could not have been ineffective when his sentence was less than if he had been sentenced as a habitual offender. Sago v. State, 978 So. 2d 1285 (Miss. Ct. App. 2008).

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that counsel was deficient because this issue was not preserved for review; notwithstanding the bar, defendant expressed satisfaction with counsel during a plea colloquy based on counsel's work to secure a recommendation for a suspended sentence, and defendant's own misconduct resulted in incarceration when the suspended sentence was later revoked. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Counsel was not ineffective for failing to present evidence in mitigation of the death penalty because an expert testified about the petitioner's mental retardation, the petitioner's mother was also questioned regarding the petitioner's mental retardation, and therefore counsel placed the issue of the petitioner's mental retardation before the jury for purposes of mitigation. Scott v. State, 938 So. 2d 1233 (Miss. 2006).

Post-conviction relief in a capital murder case based on the argument that the use of the "avoiding or preventing a lawful arrest or effecting an escape from custody" aggravator was inappropriate was denied because it was procedurally barred; however, even if it was not, the argument was meritless since sufficient evidence supported this due to the fact that the victim's telephone line was cut, two fires were set in her home, and defendant had just been released from prison. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Post-conviction relief was denied because defendant's assertion that he received ineffective assistance of counsel during the sentencing phase of a capital murder trial was procedurally barred; however, even if it was not, ineffectiveness was not shown because, despite mitigation evidence that defendant was a great person and had not been violent, the state could have presented evidence of his prior convictions. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Defendant did not receive ineffective assistance of counsel by the failure to

challenged an aggravating circumstance not named in an indictment in a capital murder case because he was not entitled to formal notice of such since an indictment for capital murder put defendant on sufficient notice that the statutory aggravating factor would have been used against him. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Denial of the inmate's motion for post-conviction relief was appropriate because his counsel was not ineffective; his counsel had filed for the inmate to undergo a mental examination and counsel further took the inmate's mental condition into consideration when asking for a lenient sentence. Hayes v. State, 935 So. 2d 1133 (Miss. Ct. App. 2006).

Inmate was not deprived of effective assistance of counsel at his plea and sentencing hearing simply because his counsel failed to object to the presence of the victim's family, because they had a right to be present and speak at the hearings. Johnson v. State, 908 So. 2d 900 (Miss. Ct. App. 2005).

Denial of the inmate's petition for post-conviction relief was proper where his counsel was not ineffective, in part because it was determined that the inmate failed to demonstrate prejudice regarding the State's scriptural references or parole argument closing argument of the sentencing phase of his trial. Thus, his counsel was not deficient for failing to object. Manning v. State, — So. 2d —, 2005 Miss. LEXIS 464 (Miss. Aug. 4, 2005), opinion withdrawn by, substituted opinion at 929 So. 2d 885, 2006 Miss. LEXIS 109 (Miss. 2006).

Defense counsel provided adequate representation at the resentencing where counsel was actively involved in the sentencing hearing; she pointed out to the court defendant's age and his need for hip replacement and asked that the condition be taken into consideration when imposing sentence; additionally, counsel requested that the court consider post-release supervision. Greer v. State, 920 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari dismissed by 933 So. 2d 303, 2006 Miss. LEXIS 307 (Miss. 2006).

Defendant failed to present the appellate court with specific, concrete facts to support his conclusory allegation that his attorney's performance was deficient and that but for his attorney's errors, his sentence would have been different; defendant failed to satisfy his burden of overcoming the strong presumption that his attorney's conduct fell within the wide range of professional assistance. Bates v. State, 914 So. 2d 297 (Miss. Ct. App. 2005).

Defendant's counsel was not ineffective for allowing him to receive an illegal sentence for possession of cocaine because the sentence was corrected six months later and defendant suffered no prejudice. Defendant presented no evidence to show that counsel's objection to the imposed sentence would have changed the outcome. Black v. State, 919 So. 2d 1017 (Miss. Ct. App. 2005).

Appellant's claim that his counsel was ineffective because he assured him that his sentence would not exceed 10 years was disproved by the record; because the plea petition that appellant signed stated the minimum and maximum penalties regarding each crime, appellant knew that his sentence could exceed 10 years. Thornhill v. State, 919 So. 2d 238 (Miss. Ct. App. 2005).

154. — — Appeal of cause, ineffectiveness of counsel.

Defendant's second motion for post-conviction relief was barred as a successive writ. Defendant's failure to perfect an appeal after the first petition was denied was due to his lack of funds and not his attorney's performance; therefore, he failed to prove the ineffective assistance of counsel. Joshua v. State, 913 So. 2d 1062 (Miss. Ct. App. 2005).

155. — — Pleading, ineffectiveness of counsel.

Inmate's claims that he lacked ineffective assistance of counsel based on counsel's failure to call two witnesses as a suppression hearing had no merit because the inmate presented no affidavits with his petition and his reliance on the assertions in his brief did not meet the requirements of Vielle and Strickland. Garcia v. State, 14 So. 3d 749 (Miss. Ct. App. 2009),

writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 383 (Miss. 2009).

Defendant's ineffective assistance of counsel argument was rebutted by a lack of evidence, as well his own statements, and a prisoner's ineffective assistance of counsel claim was without merit when the only proof offered of the claim was the prisoner's own affidavit. Starks v. State, 992 So. 2d 1245 (Miss. Ct. App. 2008).

Because an inmate offered only his own statement as proof of the claim of ineffective assistance, the inmate failed to meet his burden of showing that counsel was deficient or that the inmate was prejudiced. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Ineffective assistance of counsel claim was not addressed on direct appeal because appendixes, a transcribed telephone conversation, and references thereto were stricken from brief because they were not admitted into evidence at trial; therefore, defendant was unable to offer support from the record to substantiate his claim. Dimaio v. State, 951 So. 2d 581 (Miss. Ct. App. 2006).

Defendant was unable to raise the issue of ineffective assistance of counsel on appeal because the record did not affirmatively show ineffectiveness of constitutional dimensions and the parties did not stipulate that the record was adequate; defendant failed to show prejudice and did not meet the burden of proof since mere allegations of prejudice was not sufficient. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

Defendant convicted of murder claimed his trial counsel was constitutionally ineffective because counsel failed to file critical motions, failed to subject the State's case to a meaningful adversarial setting, and failed to investigate all of the information relating to his innocence. The appellate court was unable to consider the extra-record documents which defendant attached to his brief; the record did not affirmatively prove defendant's claim. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

In the absence of a valid claim as to the trial court's lack of jurisdiction to revoke defendant's probation, the appellate court could not possibly hold that the performance of defendant's attorney was deficient, and without such deficiency, defendant's defense clearly suffered no prejudice and no ineffective assistance of counsel was shown. Grace v. State, 919 So. 2d 987 (Miss. Ct. App. 2005).

156. — — Sufficiency of evidence, ineffectiveness of counsel.

Defendant's manslaughter conviction was appropriate because he failed to prove that he received the ineffective assistance of counsel. Defendant's claims regarding the weight and sufficiency of the evidence were without merit and those were the only issues that he argued supported his claim of ineffective assistance of counsel; as there was no merit to his claim of insufficiency of the evidence or his claim that the weight of the evidence did not support the conviction, defendant was unable to show that his attorney's performance prejudiced his defense. Martin v. State, 43 So. 3d 504 (Miss. Ct. App. 2010).

Where appellant, a forty-four-year-old male, was caught having sexual intercourse with a fourteen-year-old female, he entered a plea of guilty to statutory rape under Miss. Code Ann. § 97-3-65(1)(b). He was not entitled to post-conviction relief based on his claim of ineffective assistance of counsel; because there was ample evidence to convict him of statutory rape, there was no reasonable probability that the outcome of the case would have been different but for counsel's alleged errors. Maggitt v. State, 26 So. 3d 363 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 38 (Miss. 2010).

Denial of appellant inmate's request for post-conviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate him of the sexual battery charge because sexual penetration could be by insertion of any object into the

genital or anal opening of another person's body. Havard v. State, 988 So. 2d 322 (Miss. 2008).

Defendant failed to show ineffective assistance, because defendant stated during the plea colloquy that he was satisfied with his attorney's performance, no indication appeared in the record that defendant's attorney inaccurately advised him concerning his sentence, defendant waived his right to trial when he pled guilty, and defendant did not indicate what motions might had been filed or the likelihood of the success of such motions. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

Defendant's assertion that he received ineffective assistance of counsel was both barred by statute and without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and defendant failed to show with specificity and detail how his counsel was ineffective due to counsel's involvement in a prior investigation of defendant as police officer. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Defendant's counsel did not render ineffective assistance because defendant's argument paralleled his contention regarding the lack of evidence that the victim had been placed in fear during the course of the robbery; however, if the taking of property was effectuated by violence or force upon the victim, this action was sufficient to constitute a robbery, and therefore because defendant was an admitted participant in the robbery of the store, there was sufficient evidence presented supporting a conviction of capital murder. Anderson v. State, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Defendant's conviction for armed robbery was proper because he failed to prove that his counsel was ineffective; in part, counsel's failure to object to the introduction of evidence, which was clothing, was not ineffective because the evidence against defendant was overwhelming. Hancock v. State, 964 So. 2d 1167 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 526 (Miss. 2007).

Since the indictment was not defective, counsel's decision not to challenge it could not amount to ineffective assistance of counsel, as challenging it would not have changed the result of the proceeding; defendant failed to present any evidence that would prove ineffective assistance of counsel. Mosley v. State, 941 So. 2d 877 (Miss. Ct. App. 2006).

Defendant raised an ineffective assistance of counsel claim where there was evidence of conflicting statements by the victim as to who poured boiling water on him and was enough to raise a reasonable doubt that defendant committed the offense; if defense counsel had investigated and presented evidence of defendant's prior abuse by the victim, and of the abuse that defendant testified had taken place immediately prior to the incident, the inconsistencies in testimony of the victim's mother and sister concerning those events, and the intervening circumstances of the victim's death from respiratory failure, it was reasonable to conclude that the outcome of a jury trial may have been different. Hannah v. State, — So. 2d —, 2006 Miss. LEXIS 365 (Miss. July 20, 2006), opinion withdrawn by, substituted opinion at, remanded by 943 So. 2d 20, 2006 Miss. LEXIS 578 (Miss. 2006).

Petitioner failed to show that he received ineffective assistance of counsel because it clearly was because of defense counsel's successful negotiations that the petitioner was able to initially receive a lenient sentence and eventually able to escape a possible life sentence, and when asked by the trial court if he had any complaints about the services provided by his defense counsel, the petitioner indicated that he had no complaints whatsoever. White v. State, 921 So. 2d 402 (Miss. Ct. App. 2006).

Appellate court affirmed defendant's conviction for the sale of a controlled substance and marijuana because even if defendant's counsel's performance was defi-

cient, defendant was not prejudiced by it given that the drug transaction was videotaped and shown to the jury and the confidential informant testified against defendant. Westbrook v. State, 928 So. 2d 186 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 243 (Miss. 2006).

157. — -- Totality of circumstances, ineffectiveness of counsel.

Defendant's trial counsel was not ineffective because, inter alia: (1) it was not unreasonable for trial counsel not to ask for a mistrial since the jury was not exposed to any extrajudicial influence from a juror's statements that she might have heard something about the case, but could not be sure; and (2) counsel did not err in asking the trial court for only five minutes to consider his peremptory challenges because there was no evidence that he did not take the time given to him, he used all six of his challenges after the state's first tender, and defendant did not suggest that trial counsel did not consider striking someone he should have; given the overwhelming circumstantial evidence in the case, the appellate court could not say, but for trial counsel's failure to request a jury instruction on circumstantial evidence, there was a reasonable probability that the result of the trial would have been different. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Post-conviction relief was denied because defendant did not receive ineffective assistance of counsel based on a failure to object to a prosecutor's closing argument since references to defendant's possible escape from prison did not compromise his right to a fair trial; moreover, the prosecutor did not "ramble on and on" about his personal experiences. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

158. — — Different result or trial outcome, ineffectiveness of counsel.

It was not error for the same judge to hear an inmate's plea and motion for post-conviction relief, the inmate stated in his plea colloquy that he was satisfied with the assistance provided by his attorney, and a different result would not have occurred if the inmate's attorney would have objected to the judge presiding over both hearings, such that this did not rise to the level of ineffective assistance of counsel. Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Even if trial counsel were deficient, defendant failed to satisfy the second prong of the Strickland test, requiring that he show that counsel's deficient performance prejudiced his defense. The deficiencies defendant alleged failed to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Nichols v. State, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

Defendant's ineffective assistance claims against a court-appointed attorney failed where he failed to show how his defense was adversely affected by an indictment amendment that changed the date of the alleged burglaries. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Defendant's convictions for two counts of capital murder were upheld because while defendant was able to give several examples of what defendant perceived to be counsel's deficiencies, including counsel's failure to fully investigate through discovery motions what information the State had related to the case, defendant was not able to satisfy the second prong of the Strickland test; defendant failed to establish a reasonable probability that but for counsel's error he would have had a better result. Dahl v. State, 989 So. 2d 910 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

In a delinquency proceeding, defendant did not show that she received ineffective assistance of counsel based on a failure to file pretrial motions, subpoena witnesses,

or compel or exclude the production of evidence because there was no showing that the result of the proceeding would have been different had these actions been taken; moreover, the evidence showed that counsel cross-examined a victim and called two witnesses to testify. In the Interest of K.G., 957 So. 2d 1050 (Miss. Ct. App. 2007).

Petitioner failed to demonstrate that his counsel was ineffective for failing to investigate the background of a police informant where petitioner did not argue that he would not have pled guilty but for the ineffective assistance of his counsel, or that he was prejudiced by his attorney's alleged failure. Elliott v. State, 939 So. 2d 824 (Miss. Ct. App. 2006).

Appellate court denied an inmate's petition for post-conviction relief on the grounds that he was denied effective assistance of counsel when the inmate could not establish that he was prejudiced by the allegedly ineffective representation. Steen v. State, 933 So. 2d 1052 (Miss. Ct. App. 2006).

Defendant's conviction for capital murder was appropriate because he failed to prove that his counsel was ineffective; the appellate court failed to see how examining additional photographs would have enabled defendant's counsel to more effectively cross-examine the state's experts to the extent that the trial outcome would have changed. Williams v. State, 937 So. 2d 35 (Miss. Ct. App. 2006).

Although petitioner claimed that she was denied her right to effective assistance of counsel under the Sixth Amendment and Miss. Const. Art. 3, § 26, due to her counsel's failure to actively pursue a change of venue, generally conduct an investigation of her case, conduct an adequate investigation in preparation for the guilt-innocence phase and the sentencing phase of her trial, and to object and preserve for appeal purposes the prosecutor's improper comments during the guilt phase of the trial, the court had determined each of petitioner's arguments was without merit because, in her efforts to meet the Strickland test criteria, petitioner failed to demonstrate that her trial counsel's actions were deficient and that the deficiency prejudiced the defense of her case. Unless petitioner made both showings, it could not be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. Byrom v. State, 927 So. 2d 709 (Miss. 2006), writ of certiorari denied by 549 U.S. 1056, 127 S. Ct. 662, 166 L. Ed. 2d 520, 2006 U.S. LEXIS 9076, 75 U.S.L.W. 3283 (2006).

Defendant's counsel did not provide ineffective assistance where, although the actions of defendant's counsel were not error-free, the error of untimely witness disclosure was not so egregious as to undermine the confidence in the outcome; the disallowed alibi testimony was very weak, unpersuasive given the strength of the opposing evidence, and even contradictory; the evidence against defendant was very persuasive. Ransom v. State, 919 So. 2d 887 (Miss. 2005), writ of certiorari denied by 548 U.S. 908, 126 S. Ct. 2931, 165 L. Ed. 2d 958, 2006 U.S. LEXIS 4985, 74 U.S.L.W. 3721 (2006).

159. — — Presumptions, ineffectiveness of counsel.

Record reflected that defendant's trial counsel filed numerous pre-trial motions, including his successful motion to offer evidence of past sexual behavior, that counsel presented numerous witnesses for the defense, and that counsel succeeded in having count two of the indictment dismissed; in his appellate brief, defendant merely asserted that trial counsel should have considered making certain requests or objections, but defendant did not demonstrate how he was prejudiced by his counsel's alleged errors. Thus, defendant did not overcome the presumption that his attorney's performance fell within a wide range of reasonably professional assistance and that the decisions made by his attorney were strategic; therefore, defendant's ineffective assistance of counsel claim failed. Poynor v. State, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

160. — — Burden of proof, ineffectiveness of counsel.

Defendant failed to meet the burden required by Strickland where the circuit

court judge found defendant's counsel's testimony regarding his representation of defendant to be more credible than defendant's testimony. Hubanks v. State, 952 So. 2d 254 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 171 (Miss. 2007).

Inmate was not able to establish that his attorney rendered ineffective assistance of counsel prior to entering a guilty plea as his attorney was successful in getting other felony charges dismissed, and the inmate stated at the plea hearing that he was satisfied with his attorney's representation. Majors v. State, 946 So. 2d 369 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 50 (Miss. 2007).

Where defendant's counsel clearly presented the defendant's version of events, and a pretrial statement made by defendant to police, which was entered into evidence, allowed the jury to hear his version of the events despite his decision not to testify in his own defense, and defendant did not state what witnesses should have been called, or what additional evidence his counsel could have presented at trial, when viewed in the totality of the circumstances, the actions of defendant's counsel constituted reasonable trial strategy, and defendant did not meet his burden on appeal of showing how his counsel's decision not to call witnesses at trial was deficient performance. Townsend v. State, 933 So. 2d 986 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

161. — — Post-conviction remedies, ineffectiveness of counsel.

Pursuant to Miss. Const. Art. 3, § 26, defendant's claim that his probation officer failed to advocate his cause effectively at his revocation hearing had no merit because a claim of ineffective assistance simply would not be applicable to defendant's probation officer. Yance v. State, 30 So. 3d 370 (Miss. Ct. App. 2010).

Trial court did not err in denying an inmate's motion for post-conviction relief on the ground that his appellate counsel failed to note his trial counsel's failure to investigate and challenge a juror's inclusion on the jury because there was nothing in the record confirming that the juror actually served on the jury, and the inmate failed to show how the juror's alleged presence on the jury prejudiced his case. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Where the record did not affirmatively show ineffectiveness of counsel of constitutional dimensions, but the parties did not stipulate that the record was adequate such that the appellate court could adequately weigh the trial judge's findings of fact, the appellate court affirmed defendant's conviction for the possession of stolen property without prejudice so as to allow him to further supplement the record with additional evidence and raise his ineffective assistance claim through appropriate postconviction proceedings. Tucker v. State, 47 So. 3d 164 (Miss. Ct. App. 2009), reversed by 47 So. 3d 135, 2010 Miss. LEXIS 573 (Miss. 2010).

Defendant's trial counsel was not ineffective for failing to file a motion for a new trial or a judgment notwithstanding the verdict because (1) defendant was granted an out-of-time appeal; and (2) even if trial counsel was deficient for failing to file post-trial motions, defendant did not shown how that deficiency resulted in prejudice to his defense since his issues on appeal were included in the record. Weaver v. State, 996 So. 2d 142 (Miss. Ct. App. 2008).

Although defendant argued that trial counsel was ineffective for failing to request an instruction telling the jury to regard a witness's testimony as an accomplice with heightened scrutiny, the court did not need to reach a disposition of this issue because the record was not ripe for review of this contention, and thus, the court affirmed without prejudice to defendant's right to raise this issue in post-conviction proceedings; there was no stipulation to the adequacy of the record by the State, post-conviction proceedings might give counsel a fair change to explain the lack of the instruction, and while normally it would be standard practice for counsel to request the instruction, on the record the court could not find that the absence of the instruction equated to ineffective assistance. Thompson v. State, 995 So. 2d 831 (Miss. Ct. App. 2008).

In an armed robbery case, defendant's ineffective assistance of counsel claim was not addressed because there was no stipulation by the parties that the record was accurate, and the record did not affirmatively show ineffectiveness of constitutional dimensions. Brownlee v. State, 972 So. 2d 31 (Miss. Ct. App. 2008).

In a petition for post-conviction relief, the inmate's counsel was not ineffective because he failed to allege ineffective assistance of counsel with enough specificity and the outcome of the proceedings would not have been different because defendant admitted that he was guilty of the crime of statutory rape; thus, under Miss. Code Ann. § 99-39-11(a), the trial court properly dismissed the ineffective assistance of counsel claim without an evidentiary hearing. Brooks v. State, 953 So. 2d 291 (Miss. Ct. App. 2007).

Where a defendant raised ineffective assistance of counsel on direct appeal, and raises it again in a post-conviction proceeding, supported by extraneous materials that were not available on direct appeal, an appellate court's consideration of the issue is not barred by res judicata; where the defendant raises ineffective assistance of counsel at the post-conviction stage, and it is the same issue raised on direct appeal but only rephrased, res judicata will apply. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Defendant was not entitled to post-conviction relief based on ineffective assistance when res judicata barred some of the claims such as counsel's failure to support a motion to suppress defendant's confession, counsel's failure to properly advise on plea bargains, counsel's failure to introduce victims' impact statement, and failure to properly prepare defendant to give his testimony; and defendant's remaining claims lacked merit. Hodges v. State, 949 So. 2d 706 (Miss. 2006), writ of certiorari denied by 552 U.S. 1061, 128 S. Ct. 705, 169 L. Ed. 2d 552, 2007 U.S. LEXIS 12873, 76 U.S.L.W. 3287 (2007).

Parties did not stipulate that the record was adequate to allow the appellate court to make the finding of ineffective assistance of counsel without consideration of the findings of fact of the trial judge, and the record did not affirmatively show ineffectiveness of constitutional dimensions; accordingly, defendant could raise his ineffective assistance of counsel claim in a post-conviction relief proceeding. Terrell v. State, 952 So. 2d 998 (Miss. Ct. App. 2006).

Denial of the inmate's motion for post-conviction relief was proper because, notwithstanding the admissions and concessions contained within the inmate's petition and throughout his hearing, he further failed to offer any affidavits or additional proof in support of his claim of ineffective assistance of counsel other than his own beliefs. Ross v. State, 936 So. 2d 983 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where he failed to show that his counsel was ineffective on direct appeal. The court did not find the record to affirmatively show ineffectiveness of constitutional dimensions, nor did the court find any stipulation by the parties regarding the adequacy of the record. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Post-conviction relief was properly denied in a burglary case because appellant did not receive ineffective assistance of counsel, as appellant responded to the trial judge's questioning that his attorney discussed the case with him thoroughly and completely, and that he was satisfied with his attorney's services. Appellant also did not contend that his attorney failed to show his innocence or any violations in his prosecution. Christie v. State, 915 So. 2d 1073 (Miss. Ct. App. 2005).

ATTORNEY GENERAL OPINIONS

Where alleged perjured testimony was given in Oktibbeha County, proper jurisdiction over the matter would lie in the Circuit Court of that county. Burns, Nov.

5, 2004, A.G. Op. 04-0544.

RESEARCH REFERENCES

ALR. Adoption and application of "tainted" approach or "dual motivation" analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated. 15 A.L.R.6th 319.

Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas - Coercion or Duress. 19 A.L.R.6th 411.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of *Miranda v. Arizona* Requiring That Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation - Suspect Injured or Taken Ill. 25 A.L.R.6th 379.

What Constitutes "Custodial Interrogation" of Juvenile by Police Officer Within Rule of *Miranda v. Arizona* Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation - At Police Station or Sheriff's Office. 26 A.L.R.6th 451.

Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 A.L.R.6th 1.

What Constitutes "Custodial Interrogation" at Hospital by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation — Suspect Hospital Patient. 30 A.L.R.6th 103.

What Constitutes "Custodial Interrogation" by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation — Upon Hotel Property. 45 A.L.R.6th 337.

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 26A. Victims' rights; construction of provisions; legislative authority.

JUDICIAL DECISIONS

3. Victim's right to be present and be heard.

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

§ 27. Proceeding by indictment or information.

JUDICIAL DECISIONS

3. Necessity for indictment.

Allegations of perjury that a former prison employee brought against a warden were beyond the scope of the employee's appeal of a decision denying her unemployment compensation benefits where the allegations were not in the form of an affidavit as required by Miss. Const. Art. 3, § 27. Henry v. Miss. Dep't of Empl. Sec., 962 So. 2d 94 (Miss. Ct. App. 2007).

6. Waiver of indictment.

In a post-conviction relief proceeding in which an inmate had been represented by counsel and executed a sworn waiver of indictment and consented to be proceeded against by criminal information, he unsuccessfully argued that his guilty plea was not valid since he was not indicted for armed robbery and that his guilty plea was invalid because the information did not notify him that the first 10 years of his sentence were mandatory and because the information failed to cite the charging statute. Diggs v. State, 46 So. 3d 361 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 561 (Miss. 2010).

Defendant's motion for post-conviction relief based on an alleged violation of Miss. Const. Art. 3, § 27, was properly denied because the record reflected that defendant was represented by counsel when he waived indictment and that he executed a sworn statement that expressly waived indictment by a grand jury. Frazier v. State, 28 So. 3d 646 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 84 (Miss. 2010).

Defendant's guilty plea to armed robbery as charged in a criminal information rather than an indictment was proper under U.S. Const. Amend. V and Miss. Const. Art. 3, § 27, because defendant waived the indictment requirement. The trial court was not required under Miss. Unif. Cir. & Cty. R. 8.04 to discuss with defendant whether he was entitled to early release. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

Trial court did not err in summarily dismissing defendant's motion for post-conviction relief because defendant's burglary conviction was not unconstitutional; defendant, represented by counsel, had executed a sworn waiver of indictment to a charge of burglary brought by criminal information. Edwards v. State, 995 So. 2d 824 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 28. Cruel or unusual punishment prohibited.

JUDICIAL DECISIONS

13. Capital sentencing procedure.

1. In general.

Defendant's life sentence for murder under Miss. Code Ann. § 97-3-21 was not cruel and unusual punishment because the jury was instructed on the crimes of murder and manslaughter, the jury could have properly found defendant guilty of murder without defendant's actually having fired the gun that killed the victim, and the sentence did not exceed the statutory maximum. Trotter v. State, 9 So. 3d 402 (Miss. Ct. App. 2008).

3. Validity of statutes.

Miss. Code Ann. § 97-9-55, which makes it a criminal offense to intimidate a judge, was not unconstitutional where defendant was charged with a violation for making threats against two judges while speaking with a psychologist who treated inmates because states were permitted to ban true threats and because the protected status of threatening speech was not based upon the subjective intent of the speaker; rather, the speaker must have knowingly and intentionally communicated a potential threat that an objectively reasonable person would interpret as a serious expression of an intent to cause a present or future harm. Defendant's words posed a true threat because he was diagnosed as having the capacity to distinguish right from wrong, he intentionally communicated the threats to his psychologist and to members of the parole board, and an objectively reasonable person would interpret statements such as intending to "take care of the judges" or "take out the judges" as intending to inflict physical harm upon the judges. Hearn v. State, 3 So. 3d 722 (Miss. 2008).

4. Youthful offenders.

Defendant's mandatory life sentence, imposed pursuant to Miss. Code Ann. § 97-3-21 after his murder conviction, was not cruel and unusual punishment for purposes of U.S. Const. amend. VIII and Miss. Const. art. 3, § 28 even though defendant was 14 years old at the time of the offense because Miss. Code Ann. § 97-3-21 did not afford the trial judge any sentencing discretion or make an exception for a defendant of tender years. Evans v. State, — So. 2d —, 2011 Miss. App. LEXIS 343 (Miss. Ct. App. June 14, 2011).

5. Mentally ill and mentally deficient persons.

Circuit court's finding that a defendant, who had been convicted for capital murder and sentenced to death, failed to prove, to a preponderance of the evidence, that he was mentally retarded, was not clearly erroneous where the circuit court had considered expert testimony and ordered a forensic mental health evaluation of defendant. Doss v. State, — So. 2d —, 2008 Miss. LEXIS 608 (Miss. Dec. 11, 2008), opinion withdrawn by, substituted opinion at, remanded in part by 19 So. 3d 690, 2009 Miss. LEXIS 510 (Miss. 2009).

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

6. Indigent defendants.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the circuit court judiciously provided defendant with state-funded investigative assistance in developing mitigation evidence; an order authorizing a criminal defense investigator (CDI) was granted, followed by an order granting additional funds for the CDI, and an order provided a psychological evaluation of defendant was also granted. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

9. Sentence within statutory parameters.

Post-conviction relief was denied in a case where appellant inmate entered a guilty plea to three counts of selling co-

caine because the imposition of three consecutive five year sentences did not amount to cruel and unusual punishment. The sentence was within the guidelines in Miss. Code Ann. § 41-29-139, and there was no evidence of excessiveness under the facts of the case. Ladner v. Grand Bear Golf Course/Grand Casino of Miss., 973 So. 2d 1008 (Miss. Ct. App. 2008).

Where a sentence of 10 years with five years suspended was entered in a case where defendant entered a guilty plea to the charge of uttering a forgery, defendant was unable to challenge the sentence in a motion for post-conviction relief since it was not raised at the time of sentence; at any rate, the issue of disproportionality was meritless because the sentence was within the limits of Miss. Code Ann. § 97-21-33. Tate v. State, 961 So. 2d 763 (Miss. Ct. App. 2007).

Defendant's sentence of 20 years in prison, with 10 years to be suspended and five years of post-release probation, for one count of burglary of an occupied dwelling was not grossly disproportionate where he had been involved in other domestic disturbances prior to the one in question; thus, the 20-year sentence was within the statutory guidelines. Edge v. State, 945 So. 2d 1004 (Miss. Ct. App. 2007).

In a case involving the sale of cocaine, defendant's rights under Miss. Const. Art. 3, §§ 14, 26, 28 and U.S. Const. Amends. 5, 6, 8, and 14 were not violated by the maximum 30-year sentence; the sentence imposed was within the statutory limitation and was within the sound discretion of the trial judge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Two consecutive 20-year sentences for defendant's convictions for manslaughter and aggravated assault where he shot and killed his wife's boyfriend and shot his wife in the neck did not constitute cruel and unusual punishment as the sentences imposed were within the statutory range for Miss. Code Ann. § 97-3-25 and Miss. Code Ann. § 97-3-7(2), and the trial judge articulated his reasoning for the sentences imposed. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

10. Disproportionate sentence.

Defendant's argument that his life sentence after he was convicted of capital murder was erroneous was improper because, upon the election of the district attorney to not pursue the death penalty, the trial court had only one choice, which was the lesser sentence of life without the possibility of parole. Sentences that did not exceed the maximum term allowed by statute would not be considered grossly disproportionate and would not be disturbed on appeal. Maye v. State, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Defendant's life sentence without parole for possession of less than 0.10 gram of cocaine in violation of Miss. Code Ann. § 41-29-139(c)(1)(A) was mandatory under the circumstances and did not arise solely from his conviction of possession of cocaine but based on his status as a habitual offender under Miss. Code Ann. § 99-19-83. Furthermore, defendant's claim was procedurally barred because he did not address all three factors of the proportionality analysis. Hudson v. State, 31 So. 3d 1 (Miss. Ct. App. 2009), reversed by 30 So. 3d 1199, 2010 Miss. LEXIS 160 (Miss. 2010).

Defendant was convicted of four counts of sexual battery for repeatedly sexually battering defendant's stepdaughter during a time period when she was 11 years of age by forcing her to engage in sex acts and sexual intercourse with defendant, and defendant was sentenced to two consecutive life sentences (the statutory maximum) and two consecutive 20-year terms; defendant also stated that he took pictures of the victim and possessed child pornography, and in light of the evidence put forth supporting defendant's guilt, and the nature of the crime of which defendant was convicted, defendant's sentences were not grossly disproportionate to the offenses or constitutionally violative. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Motion for post-conviction relief was summarily dismissed since defendant was unable to show that his sentences for burglary and aggravated assault, which were within the ranges in Miss. Code Ann. § 97-17-23 and Miss. Code Ann. § 97-3-7

were grossly disproportionate; he could have received 45 years if the maximum terms had been run consecutively, and the facts showed that he broke into a house wielding a pistol and beat a victim. Denton v. State, 955 So. 2d 398 (Miss. Ct. App. 2007).

12. Habitual offenders.

Defendant's 60-year prison sentence for possession of a controlled substance with intent to sell as a habitual offender was not grossly disproportionate to the crime where defendant was aware of defendant's own criminal history and chose to proceed to trial; defendant was also apprised of the perilous situation defendant faced if defendant was found guilty at trial. Baskin v. State, 986 So. 2d 338 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 562 (Miss. 2008).

Motion for post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine under Miss. Code Ann. § 41-29-139(a) since his 20-year sentence was not illegal; because he was a habitual offender, defendant should have actually received a mandatory 30-year sentence. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

Defendant's sentence of life in prison without the possibility of parole after he was convicted of grand larceny did not violate the Eighth Amendment to the U.S. Constitution where he was sentenced within the mandatory statutory limits set out in Miss. Code Ann. § 99-19-83 for habitual offenders; his sentence was not grossly disproportionate. Kelly v. State, 947 So. 2d 1002 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 89 (Miss. 2007).

13. Capital sentencing procedure.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that when the prosecutor asked the victim's grandfather what he believed defendant's punishment should be, that action violated his rights under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and under Article 3, Sections 14, 25, and 28 of the Mississippi Constitution. It was highly unlikely that the grandfather's statement, when read as a whole and taken in context with all the evidence before the sentencing judge, was the reason the judge imposed the death penalty; in fact, the trial judge's sentencing order, in which he made findings of facts as to the various aggravating and mitigating factors, did not even mention the grandfather's testimony. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

With respect to a charge of capital murder committed during the course of a robbery, the use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Post-conviction relief was denied on the issue of whether defendant's death sentence was unconstitutionally excessive in capital murder case based on the fact that it was felony murder because the issue was procedurally barred; even if it was not, the issue was meritless since this argument had been previously rejected, and the jury found all four factors under Miss. Code Ann. § 99-19-101. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

§ 29. Excessive bail prohibited; revocation or denial of bail.

JUDICIAL DECISIONS

5. Revocation of bail.

Revocation of defendant's bail was proper pursuant to Miss. Const. Art. III, § 29(2) due to his indictment for the felony charge of perjury. Dendy v. State, 931 So. 2d 608 (Miss. Ct. App. 2005), writ of

certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

A defendant who has had his bond revoked under this section may not be released on a recognizance or other bond while awaiting trial if the charges for the second offense are still pending. If a grand jury fails to indict a defendant on the second offense charges, the circuit court may, in its discretion, dismiss the second offense charges and reset bond for the first offense charges. McCormick, June 6, 2003, A.G. Op. 03-0265.

If a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court should revoke bail for the aggravated assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge. Turnage, June 26, 2006, A.G. Op. 06-0246.

The exceptions to the right to bail do not include shoplifting offenses. Brooks, Oct. 6, 2006, A.G. Op. 06-0475.

The exceptions to the right to bail do not include shoplifting offenses. Sorrell, Oct. 6, 2006, A.G. Op. 06-0451.

§ 30. Imprisonment for debt.

JUDICIAL DECISIONS

5. Contempt.

In a divorce action, a finding of contempt against the husband was proper because his claims of an inability to pay lacked independent corroboration. Testimony at the divorce trial indicated that the husband was often paid in cash, and his prior statements regarding his income had lacked candor, at best; moreover, prior to the divorce judgment, the husband had been paying a significant amount under the temporary order, but after the divorce, he immediately began paying less, suggesting an unwillingness rather than an inability to pay. Seghini v. Seghini, 42 So. 3d 635 (Miss. Ct. App. 2010).

§ 31. Trial by jury.

JUDICIAL DECISIONS

1. Construction and application.
5. Right of trial by jury generally.
6. Directed verdict or summary judgment.
10. Habitual offender status.
10.5. Sentence enhancement.
11. Impairment of rights.
12. Fair and impartial jury.
13. Jury conduct.
14. Voir dire.
17. Waiver of jury right.

1. Construction and application.

Chancellor erred by failing to transfer a dispute over contractual obligations to a circuit court because a former member did not bring most of the claims derivatively under Miss. Code Ann. § 79-4-7.40 since he was seeking a personal recovery, and the proper procedures were not followed; moreover, the parties would have been deprived of the right to a jury trial if transfer was not obtained. ERA Franchise Sys. v. Mathis, 931 So. 2d 1278 (Miss. 2006).

5. Right of trial by jury generally.

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages

could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. Ude v. State, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 2012 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 3, 2012).

6. Directed verdict or summary judgment.

Trucker's right to a jury trial under Miss. Const. Art. 3, § 31 was not violated when summary judgment was granted in a case alleging malicious prosecution and false arrest because there was probable cause to arrest the trucker when a company's products were found on his truck. Moreover, informing the police about the potentially stolen product did not amount to an untruthful statement to support a defamation claim, the communication of the information to the police was privileged, there was no claim for tortious interference with business relations absent evidence of an intent to damage the trucker's business, and an intentional infliction of emotional distress claim failed since there was no evidence of any conduct on the part of a superintendent or a company that evoked outrage or revulsion. Richard v. Supervalu, Inc., 974 So. 2d 944 (Miss. Ct. App. 2008).

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were improperly dismissed, he was denied his right to a jury trial as set forth in Miss. Const. Art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. Pollard v. Sherwin-Williams Co., 955 So. 2d 764 (Miss. 2007).

10. Habitual offender status.

Prior convictions were a recognized exception to the requirement of a jury determination of enhancing sentencing factors, and accordingly it was not necessary that a jury determine whether the inmate qualified for enhanced sentencing as a habitual offender under Miss. Code Ann. § 99-19-83; thus, the trial court did not err when it did not empanel a jury for that purpose. Issac v. State, 968 So. 2d 951 (Miss. Ct. App. 2007).

10.5. Sentence enhancement.

Although a conviction for the sale of a controlled substance, under Miss. Code Ann. § 41-29-139, was affirmed, defendant's rights under the Sixth Amendment were violated because he did not receive a jury hearing on the issue of a thirty-year sentence enhancement, pursuant to Miss. Code Ann. § 41-29-142, for selling a controlled substance within 1,500 feet of a church. Brown v. State, 995 So. 2d 698 (Miss. 2008).

11. Impairment of rights.

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a chancery court's order transferring the case to the circuit court and two individuals, in opposing the appeal, argued that their right to a jury trial would be infringed if the case remained in chancery court, that argument failed. In chancery court, with some few statutory exceptions, the right to jury was purely within the discretion of the chancellor, and if one was empaneled, its findings were totally advisory; however, no jury trial was required by Miss. Const. Art. 3, § 31 for cases within the chancery court's jurisdiction, and chancellors historically had jurisdiction over claims for specific performance of a real estate contract. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

12. Fair and impartial jury.

Defendant's right to a fair and impartial jury was not violated by an alleged relationship between one juror and a witness for the State because none of the facts

asserted by defendant with regard to the relations between the juror and the police officer, who was the witness, could be found in or supported by the record. Hill v. State, 4 So. 3d 1063 (Miss. Ct. App. 2009).

Trial court did not err when it allowed the State to use peremptory strikes on five African American venire members and denied defendant's Batson challenges because the State provided a racially neutral reason for the challenged strike and defendant failed to rebut the State's explanations. Defendant was charged with possession of cocaine and three of the potential jurors that were removed by the State's challenges were involved with drugs, one had problems with the prosecutor, and one had voted not guilty in another strong case. Watson v. State, 991 So. 2d 662 (Miss. Ct. App. 2008).

Physician and a clinic failed to make a prima facie showing of purposeful discrimination that a deceased patient's family improperly used three of their four peremptory challenges against white members of the venire, after the deceased's family provided race-neutral explanations for the peremptory challenges; the strike percentages alone did not provide a prima facie case of discrimination because the trial record did not reflect the racial makeup of the venire, the empaneled jury, the community at large, or any other factor that might suggest these percentages alone suggested discrimination. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

13. Jury conduct.

Trial judge's observation that a juror was awake provided sufficient evidence to deny defendant's motion for mistrial based on the fact that the juror slept through the trial. Williams v. State, 919 So. 2d 250 (Miss. Ct. App. 2005).

14. Voir dire.

Trial court did not err when it allowed the State to ask jurors if they could convict a thug for shooting a thug during voir dire because although Miss. Unif. Cir. & County Ct. Prac. R. 3.05 prohibited the posing of hypothetical questions to the venire panel during voir dire that required a juror to pledge a particular verdict, the State asked a hypothetical question about thugs and did not specifically request a verdict during voir dire. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

Appellate court did not have the necessary facts to hold that a trial court erred in failing to find that a prima facie case of racial discrimination was made based on the State's exercising four of the five peremptory challenges against African American jurors because the record did not state how many potential veniremen were African American or the number of African American jurors who were actually seated on the jury. Willis v. State, 999 So. 2d 411 (Miss. Ct. App. 2008).

17. Waiver of jury right.

Defendant mortgage borrowers' claims against plaintiff bank could be arbitrated even though the arbitration agreements waived rights to a jury trial; the Seventh Amendment did not confer the right to a trial, but only the right to have a jury hear the case once it was determined that the litigation should proceed before a court, and the bank's motion to compel arbitration was granted. New South Fed. Sav. Bank v. Anding, 414 F. Supp. 2d 636 (S.D. Miss. 2005).

Article 4.

Legislative Department.

QUALIFICATIONS AND PRIVILEGES OF LEGISLATORS

§ 41. Qualifications of House of Representatives members.

JUDICIAL DECISIONS

1. In general.

Candidate was not qualified to run for the House of Representatives under Miss. Code Ann. § 23-15-299(7) because he had not lived in the district for two years prior to the elections as required by Miss. Const. Art. 4, § 41; the candidate worked outside of the district, and until his separation the candidate lived in a marital house that was outside of the district and for which he tried to claim a homestead exemption. Edwards v. Stevens, 963 So. 2d 1108 (Miss. 2007).

§ 44. Ineligibility for office of person convicted of certain crimes.

ATTORNEY GENERAL OPINIONS

An individual who was convicted of a felony offense in a federal court prior to December 8, 1992, would be eligible to hold elective office in the State of Mississippi. Walls, July 7, 2003, A.G. Op. 03-0337.

Issuance of a certificate of rehabilitation pursuant to Section 97-37-5 only restores the right to possess a weapon and does not remove a conviction and does not allow a convicted felon to be qualified as a candidate for public office. Ramsey, Apr. 1, 2005, A.G. Op. 05-0143.

Absent a felony conviction, a candidate is not disqualified from seeking election, assuming all other qualifications to hold the sought office are met. A candidate convicted after December 8, 1992 of a felony in another state, which is also a felony in Mississippi, is disqualified from seeking election to an office of profit or trust. Walsh, March 16, 2007, A.G. Op. #07-000143, 2007 Miss. AG LEXIS 114.

RULES OF PROCEDURE

§ 61. Amendment or revival by reference to title prohibited.

JUDICIAL DECISIONS

2. Validity and effect of amending acts—In general.

While Laws of 2004, ch. 595, § 13 (Section 13) had an indirect effect on Miss. Code Ann. § 25-9-127(1) by suspending it for a specified period of time, it required no reference to § 25-9-127(1) for an understanding of its meaning and scope; thus, it qualified as an amendment by implication, which was complete in itself and was not violative of Miss. Const. Art. 4, § 61, and the employee's argument that

Section 13 was unconstitutional was not persuasive. Hemba v. Miss. Dep't of Corr., 998 So. 2d 1003 (Miss. 2009).

§ 66. Law granting donation or gratuity.

ATTORNEY GENERAL OPINIONS

In the absence of a court order or consideration such as a release, payments in the form of liquidated damages by a school board to employees constitute impermissible donations and unallowable additional compensation and may not be made. Mayfield, Feb. 2, 2004, A.G. Op. 04-0036.

A school board does not have the authority to pay an employee unless services have been rendered or work has been performed. However, a school board may authorize payment to an employee utilizing accrued leave pursuant to the school district leave policy. Chaney, Feb. 20, 2004, A.G. Op. 04-0038.

The expenditure of public funds by regional mental health institutions for the purpose of providing their officers, employees or their family members with flowers or other items of value would constitute a gift or donation prohibited by the Mississippi Constitution. Hendrix, Feb. 6, 2004, A.G. Op. 04-0029.

An incentive compensation program implemented by a county development commission would be in violation of Miss. Const. art. IV, §§ 66 and 96. Allen, June 11, 2004, A.G. Op. 04-0185.

Statutes applicable to economic development authorities do not authorize severance pay or severance packages. Robinson, Oct. 8, 2004, A.G. Op. 04-0483.

Disbursing county funds to an election commissioner for the purpose of paying for the commissioner's supplemental health insurance would constitute an unlawful donation. Phillips, Aug. 8, 2005, A.G. Op. 05-0391.

Article 4, § 66 of the Mississippi Constitution prohibits a municipality from donating water to a church for any "sectarian purpose." Creekmore, Nov. 22, 2005, A.G. Op. 05-0408.

RIDES program grants may be offered to private schools without violating state law. The program, developed by the University of Mississippi, uses 80% federal and 20% state funds. Brown, Oct. 6, 2006, A.G. Op. 06-0410.

Where transfer of title to a building by a company to a county is followed by temporary retention of possession by the donating company, and the eighteen month possession of the building by the company is presumably far less than the building's appraisal value, therefore, the possession of the building after transfer would not be an impermissible donation. Crow, Dec. 8, 2006, A.G. Op. 06-0583.

Proposal whereby employee and employer agree in advance to certain conditions that, once satisfied by the employee's future performance, will obligate the employer to temporarily increase the employee's salary would not violate the constitution. Meredith, Dec. 22, 2006, A.G. Op. 06-0656.

State agencies have only such powers expressly granted to them by statute and such powers as are necessarily implied. There is no authority for Tombigbee River Valley Water Management District to financially assist a member county to obtain and pay for engineering studies on a proposed industrial site or to purchase proposed industrial property. Nichols, February 23, 2007, A.G. Op. #07-00044, 2007 Miss. AG LEXIS 29.

For the Tunica County Utility District, which is county-owned, to fund the construction of connecting water lines to a privately owned utility company would constitute an unlawful donation under Miss. Code Ann. § 19-3-40 and Miss. Const. of 1890, Art. 4 § 66, unless the private utility gives adequate consideration, which may take into account the value of and cost to replicate the backup service that would be provided to the private utility. Dulaney, March 15, 2007, A.G. Op. #07-00123, 2007 Miss. AG LEXIS 62.

LOCAL LEGISLATION

§ 87. Special or local laws.

JUDICIAL DECISIONS

1. In general.
7. Laws suspending general laws—In general.

1. In general.

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. Art. 4, § 87, Miss. Const. Art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

7. Laws suspending general laws—In general.

H.B. 1671, Reg. Sess. (Miss. 2006), was a private law which enabled the city to obtain municipal parking facilities in exchange for the conveyance of air and development rights; the last sentences of sections 3 and 4 were unconstitutional under Miss. Const. Art. IV, § 87, as exempting the bill from compliance with Miss. Code Ann. §§ 21-17-1 and 31-7-13 and were not merely procedural and minor. Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116 (Miss. 2007).

§ 88. Content of general laws.

JUDICIAL DECISIONS

2. Laws applicable to municipalities — In general.
2.5 — — Annexation.

2. Laws applicable to municipalities — In general.

Chancellor's finding comported with the law in holding that under the constitutional scheme, there is no prohibition upon the Legislature's enacting upon a given subject matter both a general law and a local and private law. It was within the Legislature's power to protect the vitality of a local utility district by including the language in H.B. 1730 (laws of 1996, ch. 970), § 12, that states that the district may not be annexed unless it is annexed in its entirety; § 12 did not offend the mandate of Miss. Const. Art, 4, § 88, and neither was it at odds with the general laws regarding annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

2.5 — — Annexation.

Language of Miss. Const. art. 4, § 90 did not support the proposition that general legislation, as contemplated by Miss. Const. art. 4, § 88, was required on the subject of annexation. Miss. Const. art. 4, § 90 listed twenty-one instances in which general laws were required; none of these instances included annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

§ 90. Matters provided for by general laws only.

JUDICIAL DECISIONS

1. In general.

Language of Miss. Const. Art. 4, § 90 did not support the proposition that general legislation, as contemplated by Miss. Const. Art. 4, § 88, was required on the subject of annexation. Miss. Const. Art. 4, § 90 listed twenty-one instances in which general laws were required; none of these instances included annexation. City of Laurel v. Sharon Waterworks Ass'n (In re Extension of the Boundaries of the City of Laurel), 17 So. 3d 529 (Miss. 2009).

PROHIBITIONS

§ 96. Extra compensation and unauthorized payments prohibited.

ATTORNEY GENERAL OPINIONS

If a school board determines that the partial time taught by a teacher in separate school years would total at least nine months of actual teaching then the requirements for a year of teaching experience are met; however, if it is clear that the employee was hired by the school district at a specific salary level and was paid accordingly for the work performed, the district may adjust the employee's level of experience prospectively, but there is no authority that would allow the district to award retroactive pay for work that has already been performed and for which an agreed upon compensation had already been provided. Chaney, Apr. 18, 2003, A.G. Op. #03-0150.

No authority can be found that would allow a school district to award retroactive pay for work that has already been performed by a teacher and for which an agreed upon compensation has already been provided. Wright, Aug. 15, 2003, A.G. Op. 03-0344.

An arrangement whereby a municipality would agree to pay a retail business a certain amount of money proportional to the sales taxes generated by that business would result in violations of the Mississippi Constitution prohibiting the forgiveness of obligations owed to municipalities, and prohibiting donations. Kerby, Dec. 5, 2003, A.G. Op. 03-0647.

In the absence of a court order or consideration such as a release, payments in the form of liquidated damages by a school board to employees constitute impermissible donations and unallowable additional compensation and may not be made. Mayfield, Feb. 2, 2004, A.G. Op. 04-0036.

The expenditure of public funds by regional mental health institutions for the purpose of providing their officers, employees or their family members with flowers or other items of value would constitute a gift or donation prohibited by the Mississippi Constitution. Hendrix, Feb. 6, 2004, A.G. Op. 04-0029.

A school board does not have the authority to pay an employee unless services have been rendered or work has been performed. However, a school board may authorize payment to an employee utilizing accrued leave pursuant to the school district leave policy. Chaney, Feb. 20, 2004, A.G. Op. 04-0038.

An incentive compensation program implemented by a county development commission would be in violation of Miss. Const. art. IV, §§ 66 and 96. Allen, June 11, 2004, A.G. Op. 04-0185.

School board members may not receive free admission to school social and sporting events, nor may they ride school buses free of charge in order to attend events that are out of town. Adams, Mar. 11, 2005, A.G. Op. 05-0039.

Where, as result of a disaster, counties enter into contractual agreements with

FEMA wherein FEMA agrees to pay overtime or additional compensations to certain personnel, if such agreements are spread upon the minutes of the board of supervisors, and if the board makes findings that such agreements constitute an employment contract applicable to exempt employees, then such payments would be permissible under Section 33-15-17. Hudson, Sept. 27, 2005, A.G. Op. 05-0477.

A school board policy that grants a "bonus" day of personal leave for perfect attendance for both licensed and non-licensed employees is permissible under Section 37-7-307 and would not violate Miss. Const. Art. 4, § 96, as long as the extra leave does not cause the total amount of leave granted to the employees to exceed the limitations of Section 37-7-307(9). Jacks, Dec. 27, 2005, A.G. Op. 05-0600.

The award of compensatory time or "holiday pay" to employees not actually working on a holiday would constitute an unlawful donation. Kohnke, Apr. 7, 2006, A.G. Op. 06-0123.

Proposal whereby employee and employer agree in advance to certain conditions that, once satisfied by the employee's future performance, will obligate the employer to temporarily increase the employee's salary would not violate the constitution. Meredith, Dec. 22, 2006, A.G. Op. 06-0656.

§ 100. Release of obligation or liability owed to State or political subdivision.

ATTORNEY GENERAL OPINIONS

A county is prohibited from forgiving uncollectible debts; however, it may utilize accounting procedures to move uncollectible debts to a special category on the county's books entitled "uncollectible" or "inactive" accounts, so that these debts do not show up in the yearly audits as "assets"; any such uncollectible debts could still be collected if circumstances changed at a later date since those debts would not actually have been forgiven. Trapp, Jr., June 20, 2003, A.G. Op. 03-0306.

An arrangement whereby a municipality would agree to pay a retail business a certain amount of money proportional to the sales taxes generated by that business would result in violations of the Mississippi Constitution prohibiting the forgiveness of obligations owed to municipalities, and prohibiting donations. Kerby, Dec. 5, 2003, A.G. Op. 03-0647.

A city may not discount or reduce the amount of indebtedness owed to it pursuant to a promissory note and deed of trust. Farmer, Sept. 16, 2005, A.G. Op. 05-0394.

A county is constitutionally prohibited from entering into a contract which provides that the terms of the contract shall be governed by the laws of another state, and/or which provides that the venue for any contractual dispute will be in the foreign jurisdiction. Nowak, Nov. 18, 2005, A.G. Op. 05-0515.

Although a city could not normally take or release a subordinate lien without violating Miss. Const. Art. 4, § 100, it is our opinion that loan contracts made pursuant to a proper federal program do not violate that section. Thomas, Dec. 27, 2005, A.G. Op. 05-0601.

MISCELLANEOUS

§ 112. Equal taxation; property tax assessments.

ATTORNEY GENERAL OPINIONS

If a person were to own a home in the city and sign homestead stating that this was his primary home and receive the assessment of 10% plus this homestead allowance there and he also owns a farm 20 miles from the city and has a second home on the farm where he spends time almost everyday and on the weekends, if the taxpayer has claimed a homestead exemption for one residence, the other residence will not qualify for the other 10% assessment. Johnson, Jan. 28, 2005, A.G. Op. 04-0643.

Where a married couple owns a home in Mississippi where the husband lives full time, he files Mississippi income tax and has his automobile tagged in this state, and they also own a home in Tennessee where the wife works and claims her residency, she tags her automobile in Tennessee and does not pay Mississippi income tax, it appears that the Mississippi property would qualify for the 10% assessment. Johnson, Jan. 28, 2005, A.G. Op. 04-0643.

ARTICLE 5.

EXECUTIVE.

§ 116. Governor; term of office.

JUDICIAL DECISIONS

1. In general.

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 million were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

§ 123. Faithful execution of laws.

JUDICIAL DECISIONS

1. Construction and application.

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 mil-

lion were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

§ 124. Reprieves and pardons.

JUDICIAL DECISIONS

9. Good time.

Executive earned time was a reduction or release granted by the governor under Miss. Const. Art. 5, § 124 and was not subject to the earned release supervision program in Miss. Code Ann. § 47-5-138(5). Peters v. State, 935 So. 2d 1064 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 400 (Miss. 2006), dismissed by 2009 U.S. Dist. LEXIS 70505 (N.D. Miss. Aug. 12, 2009).

§ 125. Suspension of defaulting treasurers and tax collectors.

ATTORNEY GENERAL OPINIONS

There is no statutory authority for a board of supervisors to continue to pay a suspended tax collector where no services will be performed and where there is no authority for the suspended tax collector to act and perform any duties in any official capacity. An individual appointed to serve as tax collector on a temporary basis is entitled to the same compensation as the elected tax collector was receiving at the time of suspension. McWilliams, Oct. 24, 2003, A.G. Op. 30-0572.

The governor has authority, upon being satisfied that investigations have been closed, to rescind his prior order suspending a tax collector and thereby reinstate her to office. Straughter, Apr. 26, 2005, A.G. Op. 05-0207.

§ 138. Selection of county officers.

JUDICIAL DECISIONS

4. Others.

In a case in which defendant, a former county circuit clerk, was convicted of embezzlement, in violation of 18 U.S.C.S. § 666(a)(1), his reliance on the Phillips decision (United States v. Phillips, 219 F.3d 404 (5th Cir. 2000)), a Louisiana case, was misplaced. In the Phillips case, defendant, a former tax assessor of a parish, was not an agent of the parish under 18 U.S.C.S. § § 666(d)(1), because Louisiana law completely separated the tax assessor's office from the parish government; however, in Mississippi, circuit clerks were not completely separated from county governments in Mississippi, and the Phillips decision was not applicable in the present case. United States v. Harris, 2008 U.S. App. LEXIS 22020 (5th Cir. Oct. 21, 2008).

ARTICLE 6.

JUDICIARY.

§ 144. Judicial power of state.

JUDICIAL DECISIONS

1. Judicial powers and functions — In general.
2. Rules of court, judicial powers and functions.

1. Judicial powers and functions — In general.

Pursuant to the authority granted to it by Miss. Const. Art. 6, § 144, the state supreme court established the Mississippi Access to Justice Commission to ensure that all persons of the state had equal access to justice within the state without regard to economic status. In re Establishing the Miss. Access to Justice Comm'n, — So. 2d —, 2006 Miss. LEXIS 350 (Miss. June 28, 2006).

2. Rules of court, judicial powers and functions.

Trial judge is not required, prior to accepting a guilty plea, to inform a defendant of the sex offender registration laws, Miss. Code Ann. §§ 45-33-25 through 31 because Miss. Code Ann. § 45-33-39(1) confers no right on a criminal defendant charged with a sex crime and imposes no duty on trial judges, and judicial rules, such as the rules of evidence, civil procedure, criminal procedure, and professional conduct, neither come from the Legislature nor require legislative approval; the Mississippi legislative branch of government may not, through procedural legislation, control the function of the judiciary, and subservience to legislation that mandates what trial judges must say to a defendant in a courtroom during a plea hearing would be tantamount to both an abdication of judicial duty, as well as tacit approval of legislative usurpation of the judicial prerogative. Magyar v. State, 18 So. 3d 807 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3274, 176 L. Ed. 2d 1182, 2010 U.S. LEXIS 3999, 78 U.S.L.W. 3667 (U.S. 2010).

§ 147. Reversal of judgment for want of jurisdiction; remand.

JUDICIAL DECISIONS

1. In general.
2. Interlocutory decrees.
3. Error of jurisdiction as between equity and law—In general.
4. — Chancery court determinations, errors of jurisdiction as between equity and law.

1. In general.

Plain error occurred in addition to the chancery court's erroneous exercise of jurisdiction over an eviction proceeding because the chancery court granted summary judgment in favor of the lessor when such relief was not requested by the lessor's motion to dismiss anticipated pleadings. Further, the chancery court's entry of a final judgment on the merits without a hearing or trial constituted plain error. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Because a party did not raise the issue of subject matter jurisdiction until after summary judgment had been granted in favor of the adverse party, the reviewing court could only reverse for lack of subject matter jurisdiction where there was also some other trial court error warranting reversal. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Under Miss. Const. Art. VI, § 147, the appellate court had to address the beneficiaries' claims besides their right to jury trial argument to determine if there was error other than as to jurisdiction. Win-

ters v. AmSouth Bank, 964 So. 2d 595 (Miss. Ct. App. 2007).

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; under Miss. Const. Art. 6, § 147, the appellate court could not reverse the chancery court without finding an error in addition to lack of subject matter jurisdiction. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

2. Interlocutory decrees.

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the Mississippi Supreme Court was not prohibited from reversing that determination since no final judgment had been entered in the case. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

3. Error of jurisdiction as between equity and law—In general.

4. — Chancery court determinations, errors of jurisdiction as between equity and law.

Although the chancellor of a county chancery court determined that the case concerned questions of foreclosure, and therefore jurisdiction was proper, even if jurisdiction had been problematic, pursuant to Miss. Const. Art. 6, § 147, the judgment could not be reversed without finding an error in addition to lack of subject matter jurisdiction. In re Estate of May v. First Fed. Bank, 32 So. 3d 1227 (Miss. Ct. App. 2010).

§ 155. Judicial oath of office.

JUDICIAL DECISIONS

1. In general.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

§ 156. Jurisdiction of circuit court.

JUDICIAL DECISIONS

1. In general.
2. Original jurisdiction.

1. In general.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Where a casino developer sued a partnership in chancery court to enforce the parties' lease agreement, and the partnership sought a declaration in circuit court that the contracts were no longer binding, as the case was filed first in the circuit court, and as the circuit court was a court

of competent jurisdiction, the case properly belonged in the circuit court under Miss. Const. Art. VI, 156. RAS Family Partners, LP v. Onman Biloxi, LLC, 968 So. 2d 926 (Miss. 2007).

2. Original jurisdiction.

Circuit court had subject matter jurisdiction under Miss. Const. Art. 6, § 156 to hear a breach of contract case arising from a creditor's failure to rectify an incorrect deed description in a timely manner because it could have heard equitable claims connected to a contractual relationship, despite the jurisdiction of the chancery courts. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on a claim that a circuit court lacked jurisdiction over a guilty plea based on the alleged price of stolen items in a larceny case because the circuit court had original jurisdiction over all matters civil and criminal; moreover, defendant was unable to litigate her actual guilt on appeal from a denial of post-conviction relief. Jones v. State, 948 So. 2d 499 (Miss. Ct. App. 2007).

§ 157. Exclusive jurisdiction of chancery court; transfer.

JUDICIAL DECISIONS

2. Jurisdiction of chancery court.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

§ 159. Jurisdiction of chancery court.

JUDICIAL DECISIONS

1. In general.
3. Full jurisdiction.
5. All matters in equity—In general.
8. Custody of children.
10. Testamentary and administration matters.

1. In general.

Alleged violation of the Mississippi Canons of Judicial Conduct is not cognizable as a cause of action before the Mississippi trial courts, but rather must be pursued through the Mississippi Commission on Judicial Performance or the Mississippi Special Committee on Judicial Election Campaign Intervention; therefore, a temporary restraining order was dissolved where it was based on a judicial candidate allegedly making false statements during a campaign because a chancery court had no jurisdiction to hear such. In re Bell, 962 So. 2d 537 (Miss. 2007).

Only remedy provided in Miss. Code Ann. § 23-15-977.1 for offering false information in a pledge or oath is a criminal action for perjury, and it provides no civil claim or cause of action for the failure of a candidate to fulfill the pledge or oath; therefore, a chancery court had no jurisdiction to hear such a claim in an election dispute because it was unable to hear criminal matters. In re Bell, 962 So. 2d 537 (Miss. 2007).

Temporary restraining order prohibiting a judicial candidate from making allegedly false statements was dissolved because a chancery court lacked jurisdiction

to hear such disputes since its power was limited to the system of justice administered by England's high court of chancery. In re Bell, 962 So. 2d 537 (Miss. 2007).

Finding in favor of the grower in an action involving a breach of contract was inappropriate because having the claims adjudicated in chancery court would have deprived the furnisher of the right to a jury trial, and thus the chancellor erred in failing to transfer the matter to circuit court; further, the supreme court had held that breach of contract issues were best heard in the circuit court. Tyson Breeders, Inc. v. Harrison, 940 So. 2d 230 (Miss. 2006), remanded en banc by 2011 Miss. App. LEXIS 395 (Miss. Ct. App. June 28, 2011).

3. Full jurisdiction.

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

5. All matters in equity—In general.

Circuit court had subject matter jurisdiction under Miss. Const. Art. 6, § 156 to hear a breach of contract case arising from a creditor's failure to rectify an incorrect deed description in a timely manner because it could have heard equitable claims connected to a contractual relationship, despite the jurisdiction of the chancery courts. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286 (Miss. Ct. App. 2007).

8. Custody of children.

Father's failure to provide information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, Miss. Code Ann. § 93-27-209, did not deprive the chancery court of jurisdiction over a modification of custody action because the issue was not jurisdictional and was within the sound discretion of the chancellor; the chancery court's jurisdiction is set by the Mississippi Constitution, Miss. Const. Art. VI, § 159, and cannot be diminished by statute, and the plain language of § 93-27-209(2) provides that, in the event the required disclosures are not filed, the court "may" stay the proceeding. White v. White, 26 So. 3d 342 (Miss. 2010).

10. Testamentary and administration matters.

Forum county pursuant to Miss. Const. Art. VI, § 159 had full jurisdiction over admission of the testator's will to probate. Indeed, under that constitutional provision it had full jurisdiction over matters testamentary and of administration, and the forum county under Miss. Code Ann. § 91-7-1 was the proper location to hear probate matters concerning the testator's estate because the testator at the time of his death had a fixed residence in the forum county. Ellzey v. McCormick, 17 So. 3d 583 (Miss. Ct. App. 2009).

As decedent's will was not a foreign will, but a domestic will, sounding in Mississippi law, executed by the decedent in Mississippi where he had resided in a residential care facility for 25 years, and where he died, the trial court properly determined that it had subject matter jurisdiction to probate the will under Miss. Code Ann. § 91-7-1. Estate of Kelly v. Cuevas, 951 So. 2d 543 (Miss. 2007).

Chancery court had full jurisdiction over probate of the will of nondomiciliary where decedent, after living in a Mississippi county for more than 30 years, had at least acquired some clothing or other personal property in the county in which he died. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

RESEARCH REFERENCES

Law Reviews. Comment: Changing Jurisdiction in Chancery Court, 25 Miss. C. L. Rev. 109, Fall, 2005.

§ 160. Additional jurisdiction of chancery court.

JUDICIAL DECISIONS

1. In general.

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; such authority was conferred by Miss. Const. Art. 6, § 160, history, and precedent. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

§ 162. Transfer to circuit court.

JUDICIAL DECISIONS

2. Transfer of causes—In general.
4. — — Erroneous transfer of causes.
5. — — Appeal, transfer of causes.

2. Transfer of causes—In general.

4. — — Erroneous transfer of causes.

In a breach of contract case in which two individuals sued a Mississippi corporation in chancery court and the corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the chancery court erred by ordering the case transferred to the circuit court because the chancery court had subject matter jurisdiction. The primary thrust of the individuals' complaint was a request for equitable relief in the form of specific performance of a real estate contract, specific performance was a particularly appropriate remedy for breach of a real estate contract, and claims for specific performance were within the historic equity jurisdiction of the chancery court. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

Finding in favor of the grower in an action involving a breach of contract was inappropriate because having the claims adjudicated in chancery court would have deprived the furnisher of the right to a jury trial, and thus the chancellor erred in failing to transfer the matter to circuit court; further, the supreme court had held that breach of contract issues were best heard in the circuit court. Tyson Breeders, Inc. v. Harrison, 940 So. 2d 230 (Miss. 2006), remanded en banc by 2011 Miss. App. LEXIS 395 (Miss. Ct. App. June 28, 2011).

5. — — Appeal, transfer of causes.

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the Mississippi Supreme Court was not prohibited from reversing that determination since no final judgment had been entered in the case. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

§ 165. Disqualification of judges.

JUDICIAL DECISIONS

2. Grounds of disqualification—In general.

Where defense counsel revealed to a trial judge in an ex parte conference that a defendant had confessed to the murder and was intent on falsely testifying, the trial judge did not allow counsel to withdraw from the case and did not commit manifest error in failing to recuse herself; the judge was not the ultimate trier of fact because it was a jury trial. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

Trial court did not abuse its discretion in denying a mother's motion for recusal as the appellate record did not identify any evidence under Miss. Const. Art. 6, § 165 or Miss. Code. Ann. § 9-1-11 that would disqualify the trial judge. J.N.W.E. v. W.D.W., 922 So. 2d 12 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 129 (Miss. 2006).

3. — — Reasonable person standard, grounds for disqualification.

Defendant was denied his right to a fair trial because the trial judge, sitting as finder of fact on defendant's motion to suppress, was informed by defense counsel that defendant had confessed to counsel that he committed the crime and that he intended to offer perjured testimony at trial, and therefore, the trial judge should have recused herself from hearing the motion to suppress, and her failure to do so deprived defendant of his right to due process. Scott v. State, 8 So. 3d 871 (Miss. Ct. App. 2008), reversed by 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008).

4. — — Bias or prejudice, grounds for disqualification.

Trial judge was not required to recuse herself, absent some showing of bias; defense counsel was not deficient in not making a request that properly could have been denied, and there was no prejudice or bias on the judge's part. Williams v. State, 971 So. 2d 581 (Miss. 2007).

In a case alleging tortious interference with business relations, there was no error based on a trial judge's failure to recuse himself under Miss. Unif. Cir. & Cty. R. 1.15 because the owners failed to raise the issue of alleged impartiality at the trial court level; the owners' website showed that they knew of a grounds for recusal at the time of trial, and even if the owners had not been able to raise this issue before the trial judge, a reversal would still not have been granted because the judge was not connected to the objectors by affinity or consanguinity, and he had no interest in the outcome of the case based on vague allegations that the judge had eaten at the owners' lodge. Bateman v. Gray, 963 So. 2d 1284 (Miss. Ct. App. 2007).

5. — — Prior knowledge or experience, grounds for disqualification.

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, the judge should have been recused. It was an abuse of discretion for the judge to rule on appellant's motion for post-conviction relief. Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).

8. Waiver.

Circuit judge, who as an assistant district attorney had participated in a suspect's prosecution, was disqualified from ruling on the suspect's motion for postconviction relief and should have recused himself because, even assuming that the suspect had effectively waived the judge's disqualification to preside over his guilty plea hearing, that waiver did not extend

to the postconviction proceeding, which was separate and distinct from the underlying criminal proceeding. Holmes v. State, 966 So. 2d 858 (Miss. Ct. App. 2007).

ATTORNEY GENERAL OPINIONS

A practicing attorney selected as a special judge for service on the Supreme Court may remain of counsel in all cases presently pending in the state and federal courts. However, pursuant to § 9-1-25 which applies to any judge of the Supreme Court, a special judge may not be engaged in the practice of law and, therefore, may not practice in any of the state courts during his tenure as a special judge. A special judge may, pursuant to the same statute, practice in the federal courts in any case in which he or she was engaged when appointed. Hurst, May, 21, 2004, A.G. Op. 04-0180.

§ 169. Style of process.

JUDICIAL DECISIONS

4. Indictment.

In a case in which an inmate appealed the summary dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment charging him with armed robbery was defective because his indictment did not properly conclude with the words "against the peace and dignity of the State," thereby violating Miss. Const. Art. 6, § 169. Since he had entered a valid plea of guilty to the crime of strong armed robbery, a lesser offense to the crime of armed robbery charged in the indictment, he could not now challenge the validity of the indictment for the alleged defect he claims existed therein. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

Because a fundamental right was not affected by the mere fact that the portion of the indictment charging defendant as a habitual offender was on a separate page from the words "against the peace and dignity of the State of Mississippi," as required by Miss. Const. Art. VI, § 169, defendant's challenge to the sufficiency of his indictment was waived, and he was procedurally barred from challenging his indictment on appeal. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Inmate's petition for post-conviction relief was denied because he waived the right to challenge on the basis of speedy trial or a defect in the indictment under Miss. Const. Art. VI, § 169 when he entered a guilty plea. Burch v. State, 929 So. 2d 394 (Miss. Ct. App. 2006).

§ 170. County districts; board of supervisors.

JUDICIAL DECISIONS

8. Liabilities.

County was not immune from its duty to properly maintain, inspect, and perform such other duties as may be required by law, with respect to the bridge; pursuant to Miss. Code Ann. § 65-7-117 and Miss. Code Ann. § 65-9-25, the county was under the statutory duty to properly maintain and to inspect State Aid roads such as the bridge where the accident occurred. Ladner v. Stone County, 938 So. 2d 270 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

A county is authorized under statutes governing general jurisdiction over roads to acquire right-of-way for and construct sidewalks along county roads as part of the county road system utilizing road and bridge funds if the board of supervisors determines, as reflected by an order entered upon its minutes, that such is necessary and convenient for the use of the traveling public. Hollimon, June 4, 2004, A.G. Op. 03-0616.

A county may not prohibit the traffic on the private road from utilizing the public road. But, the county may exercise reasonable regulation and control through the use of design standards, safety regulations, and current traffic laws when determining how the private road joins the end of the county road. Kilpatrick, July 16, 2004, A.G. Op. 04-0306.

A county may adopt and enforce regulations permitting the construction of certain private structures within county road right-of-ways. However, the county is not authorized to assist in the construction of such structures as this activity would amount to unauthorized expenditure of public funds. Nowak, Feb. 14, 2005, A.G. Op. 05-0036.

If a county desires to expand a road, the owner of a structure placed in the road with the county's permission would be required to remove it at his own cost. Nowak, Feb. 14, 2005, A.G. Op. 05-0036.

§ 171. Justice court judges; jurisdiction.

JUDICIAL DECISIONS

1. In general.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

§ 176. Qualifications for member of board of supervisors.

JUDICIAL DECISIONS

1. In general.

Candidate for county supervisor was a resident of another county, and thus ineligible for office under residency requirements of Miss. Const. Art. VI, § 176 and Miss. Code Ann. § 19-3-3, because there was no showing that he maintained a permanent residence in the county of his candidacy, notwithstanding that the candidate grew up in that county, claimed ownership of property there, regularly visited his mother there, had registered to vote and voted there, and had other contacts to that county. Young v. Stevens, 968 So. 2d 1260 (Miss. 2007).

§ 177A. Commission on Judicial Performance.

JUDICIAL DECISIONS

2. Construction and application.
4. Powers and duties of supreme court.
7. Willful misconduct.
7.5. Conduct prejudicial to the administration of justice.
8. Sanctions—In general.
9. — — Reprimand, sanctions.
10. — — Removal from office, sanctions.
11. — — Suspension, sanctions.

2. Construction and application.

Alleged violation of the Mississippi Canons of Judicial Conduct is not cogni-

zable as a cause of action before the Mississippi trial courts, but rather must be pursued through the Mississippi Commission on Judicial Performance or the Mississippi Special Committee on Judicial Election Campaign Intervention; therefore, a temporary restraining order was dissolved where it was based on a judicial candidate allegedly making false statements during a campaign because a chancery court had no jurisdiction to hear such. In re Bell, 962 So. 2d 537 (Miss. 2007).

4. Powers and duties of supreme court.

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

7. Willful misconduct.

Judge was publicly reprimanded and suspended for six months for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(1), 3(B)(2), 3(B)(7), 3(B)(8), and 3(E)(1), where the judge refused to rule in certain criminal cases pending the outcome of a non-issue related civil case, engaged in ex parte communications, with a litigant and, based upon that information, issued an arrest warrant. Further, the judge held a defendant without bond on a non-capital offense, acquired ex parte information by sitting in on a civil hearing involving parties that had cases pending before the judge, improperly reduced a defendant's bond, behaved with impropriety or the appearance of impropriety toward certain litigants or persons related to litigants that had cases pending in the court, refused to reduce a defendant's bond based upon information received ex parte and allowed testimony at a defendant's preliminary hearing about alleged threats that were supposedly made against the judge by the defendant. Miss. Comm'n on Judicial Performance v. Anderson, 32 So. 3d 1180 (Miss. 2010).

Judge was publicly reprimanded, suspended for a period of six months, and assessed costs for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), and 4(A), where the judge interfered with the administration of justice by delaying the resolution of an eviction action, and committed willful misconduct by failing to disclose a conflict of interest, and failing to properly recuse himself. Miss. Comm'n on Judicial Performance v. Hartzog, 32 So. 3d 1188 (Miss. 2010).

While the judge did delay in issuing a ruling in a case in violation of Miss. Code Jud. Conduct Canon 1, 2A, 3B(8) and 3C(1), the court did not find willfulness under Miss. Const., Art. 6, § 177A(b), (c), but did find negligence. The judge testified that he was presented a case of first impression for him and that it wasn't his intention that it be held up, and the summary judgment hearing was held approximately ten days after he had started treatment for a serious medical condition, with those treatments continuing for a period of several months. Miss. Comm'n on Judicial Performance v. Agin, 17 So. 3d 578 (Miss. 2009).

Removal of the judge from office was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), and 3(E) when he committed a minor child to detention after recusing himself from the case and then entered an order appointing another judge to hear the case without authority. His actions constituted willful misconduct in office and conduct prejudicial to the administration of justice and his assertion that his actions were a mere error of law was without merit. Miss. Comm'n on Judicial Performance v. Osborne, 16 So. 3d 16 (Miss. 2009).

Public reprimand imposed against a judge was proper because he had engaged in ex parte communications with parties involved in a disturbance-of-the-peace case and also entered a plea of not guilty for one of the parties. That misconduct violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(B)(7), and was willful, prejudicial to the administration of justice, and brought the judi-

cial office into disrepute. Miss. Comm'n on Judicial Performance v. Vess, 10 So. 3d 486 (Miss. 2009).

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance's finding that a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Conduct of judge in making disparaging remarks constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge had to be publicly reprimanded and assessed all costs associated with the proceeding. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Where the Mississippi Commission on Judicial Performance, acting on information from a police officer, filed a formal complaint against a municipal court judge, accusing the judge of inappropriately engaging in "fixing" traffic tickets, it was determined that the judge used his position to fix tickets by "passing" them to the file without requiring defendants to appear and over the objections from the issuing officer; clear and convincing evidence showed that the judge's actions violated numerous Miss. Code Jud. Conduct Canons as well as Miss. Const. Art. 6, § 177A; whether the judge's actions were actually willful was of no consequence because the result was the same regardless of whether bad faith or negligence and ignorance were involved and warranted sanctions. Miss. Comm'n on Judicial Performance v. Gordon, 955 So. 2d 300 (Miss. 2007).

Where a justice court judge acted to cause a complaining officer to not show up for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and imposed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

7.5. Conduct prejudicial to the administration of justice.

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Public reprimand and a 30-day suspension were reasonable sanctions for engaging in willful misconduct in office prejudicial to the administration of justice because the 10 violations before the court, including ex parte communications, two counts of violating Miss. Unif. R.P.J. Ct. 2.06, an attempt to fix traffic tickets, five counts of improperly dismissing or disposing of charges, and an improper order to issue two contempt warrants, constituted a pattern of behavior and the judge's conduct involved moral turpitude, but he had no prior appearance before the Mississippi

Commission on Judicial Performance. Miss. Comm'n on Judicial Performance v. Bradford, 18 So. 3d 251 (Miss. 2009).

Order that the judge be suspended from office for a period of one year was appropriate because his disparaging racial remarks were not protected speech under either the federal or state constitution. The judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) and (B), and 3(B)(5), thus causing the judge's conduct to be actionable under Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Judge's actions in engaging in ex parte communications with community members constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge's actions violated Miss. Code Jud. Canons 1, 2A, 2B, 3B(2), and 3B(7); he was publicly reprimanded and suspended for sixty days. Miss. Comm'n on Judicial Performance v. Carr, 990 So. 2d 763 (Miss. 2008).

County judge was ordered to be publicly reprimanded and suspended for 30 days because he had repeatedly offered advice to a litigant in ex parte conversations, conduct that was prejudicial to the administration of justice, violated various canons of the Code of Judicial Conduct, and was actionable pursuant to Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Fowlkes, 967 So. 2d 12 (Miss. 2007).

In handling several matters set before his court, a judge was found to be in violation of numerous Canons of the Miss. Code Jud. Conduct as well as the Mississippi Constitution where the judge ackowledged that his actions in refusing to allow a defendant to present evidence, in presiding over a probation revocation matter in which there were recusal issues, trying a defendant in absentia, and in revoking bail and issuing an arrest warrant were in violation of judicial canons; the judge's conduct constituted willful misconduct, and a public reprimand, suspension from office, and assessment of a fine and costs were warranted. Miss. Comm'n on Judicial Performance v. Roberts, 952 So. 2d 934 (Miss. 2007).

State supreme court granted a joint motion for the approval of the recommendation of sanctions against a judge who violated Miss. Code Jud. Conduct Canon 3(E) by participating in proceedings where there was an admitted conflict of interest, and committed willful misconduct that brought the judicial office into disrepute pursuant to Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Cowart, 936 So. 2d 343 (Miss. 2006).

8. Sanctions—In general.

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

9. — — Reprimand, sanctions.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Judge was publicly reprimanded, suspended from office for 30 days without pay, and assessed costs for violating Miss. Code Jud. Conduct Canon 1, 2(A), 2(B), 3(B)(1), 3(B)(2), 3(C)(1), and 3(E)(1) by sua sponte reducing bonds and charges without proper motion; conditioning the reduction on church attendance; exceeding her authority by altering bonds after a defendant had been released on bond or had waived preliminary hearing, or after a preliminary hearing had been conducted; permitting others to create the impression that they were in a special position to

influence her as a judge; initiating and inviting ex parte communications; and presiding at her nephew's initial appearance. Miss. Comm'n on Judicial Performance v. Dearman, 66 So. 3d 112 (Miss. 2011).

Based on the judge's actions and his history of judicial misconduct, the harshest constitutional remedy — removal from office — would be appropriate; however, the judge had resigned his position, and since the judge's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, the judge was ordered to be publicly reprimanded. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Where a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused, the court ordered the judge publicly reprimanded and subjected the judge an additional fine in lieu of suspension of office. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Where a judge violated Canons 1, 2B and 3B(2) of the Code of Judicial Conduct by expressing anger at a second judge for refusing to talk with him before signing an arrest warrant, and then instructing a deputy clerk not to issue the warrant, public reprimand was appropriate because such conduct created the appearance that the judge might be partial to certain interests and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

10. — — Removal from office, sanctions.

Motion to dismiss order of interim suspension filed by the Mississippi Commission on Judicial Performance was dismissed as moot and a circuit court judge was removed from office because the Commission exceeded its authority under Miss. Const. Art. 6, § 177A since the supreme court had neither been presented with nor asked to approve any agreement between the Commission and a circuit court judge; the supreme court could not allow the dismissal of formal complaints in two separate cases pursuant to the circuit court judge's resignation or any mere agreement not to seek judicial office in the future, and based upon the seriousness of the circuit court judge's admitted criminal acts and judicial misconduct, he was removed from office. Miss. Comm'n on Judicial Performance v. DeLaughter, 29 So. 3d 750 (Miss. 2010).

11. — — Suspension, sanctions.

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him. Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Justice court judge was suspended from office for ninety days without pay and was

publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Although a judge admitted to willful misconduct under Miss. Const. art. 6, § 177A and it was the first time the judge had been sanctioned, a public reprimand was too lenient, as the judge's conduct, which included abusing the judge's contempt powers and wrongfully issuing a search warrant, called for a suspension, especially as the judge had deprived litigants of due process. Miss. Comm'n on Judicial Performance v. Patton, 57 So. 3d 626 (Miss. 2011).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 1. Pursuant to Miss. Const. Art. 6, § 177A, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

ARTICLE 7.

CORPORATIONS.

§ 180. Organization.

JUDICIAL DECISIONS

2. Construction.

There was nothing sinister in the fact that the organizational documents of a corporation were drafted after its formation and dated so that they were made retroactive to the date of formation because the documents were drafted after the incorporation of corporation, but within the two-year period of time specified under Miss. Const. art. 7, § 180. Bayou Louie Farm, Inc. v. White (In re Heigle), 401 B.R. 752 (Bankr. S.D. Miss. 2008).

§ 182. Tax exemptions.

ATTORNEY GENERAL OPINIONS

The current corporate lessee of county-owned property first leased in 1963 under the old A. & I. statutes with exemption from ad valorem taxes for an unspecified period is entitled to an exemption for 10 years from the date the county approved assignment of the lease to that company. When the 10 years has already expired and the county erroneously omitted that leasehold from the tax assessment rolls for several years, the county may not assess back taxes. Approval by the county of sub-leases of the property is not an unlawful donation to a private party. Munn, March 9, 2007, A.G. Op. #07-00067, 2007 Miss. AG LEXIS 101.

§ 183. Subscription to capital stock by counties or municipalities.

ATTORNEY GENERAL OPINIONS

County hospital may not effect the issuance of an irrevocable letter of credit by a bank in favor of the insurance carrier in any amount. Yarborough, June 6, 2003, A.G. Op. 03-0255.

§ 184. Railroads.

JUDICIAL DECISIONS

3. Adverse possession against railroad.

Private party such as the landowners who brought suit against the railroad could not obtain a prescriptive easement across active railroad tracks, which were tracks that carried persons or property for hire; under Miss. Const. art. 7, § 184, the tracks were public highways. Miss. Exp. R.R. Co. v. Rouse, 926 So. 2d 218 (Miss. 2006).

Judgment allowing easement by prescription of a railroad crossing was reversed because under the Mississippi Constitution, the tracks were considered public highways and prescriptive easements could not be obtained by private citizens across active railroad lines. Miss. Exp. R.R. v. Rouse, — So. 2d —, 2005 Miss. LEXIS 808 (Miss. Dec. 8, 2005), opinion withdrawn by, substituted opinion at 926 So. 2d 218, 2006 Miss. LEXIS 190 (Miss. 2006).

Article 8.

Education.

§ 201. Free public schools.

JUDICIAL DECISIONS

2.5. Discipline.

When a student was suspended after allegedly intentionally inflicting cuts on her arm, the student's right to an education under Miss. Const. Art. VIII, § 201 was not violated because she was offered placement in an alternative school instead of the suspension. Foster v. Tupelo Pub. Sch. Dist., 569 F. Supp. 2d 667 (N.D. Miss. 2008).

§ 208. Control of funds by religious sect; certain appropriations prohibited.

ATTORNEY GENERAL OPINIONS

RIDES program grants may be offered to private schools without violating state law. The program, developed by the University of Mississippi, uses 80% federal and 20% state funds. Brown, Oct. 6, 2006, A.G. Op. 06-0410.

§ 213A. State institutions of higher learning.

JUDICIAL DECISIONS

1. In general.
2. Board of trustees.

1. In general.

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contractual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss Code Ann. § 11-46-1 et seq., that all administrative remedies be exhausted prior to filing suit. Whiting v. Univ. of S. Miss., 62 So. 3d 907 (Miss. 2011).

2. Board of trustees.

Former state university student's 42 U.S.C.S. §§ 1981, 1983 race discrimination claims against the university, a state board of trustees, and several professors were barred under the U.S. Const. Amend. XI doctrine of sovereign immunity; both the university and the board were arms of the State of Mississippi where the board was created pursuant to Miss. Const. Art. 8, § 213A, the Mississippi Legislature granted further authority to the board via Miss. Code Ann. § 37-101-1, and the university was a public university created by statute and placed under the auspices of the board via Miss. Code Ann. §§ 37-125-1 et seq. and 37-101-1. Washington v. Jackson State Univ., 532 F. Supp. 2d 804 (S.D. Miss. Mar. 15, 2006), appeal dismissed by 244 Fed. Appx. 589, 2007 U.S. App. LEXIS 18811 (5th Cir. Miss. 2007).

ARTICLE 9.

MILITIA.

§ 214. Persons subject to military duty.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 215. Organization of militia by Legislature.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

§ 217. Governor as Commander-in-Chief.

RESEARCH REFERENCES

Law Reviews. Separation of Powers at the State Level, Part II: Service in a Civilian Public Office and in the National Guard, 74 Miss. L.J. 47, Fall, 2004.

Article 11.

Levees.

§ 227. Maintenance of levee system.

JUDICIAL DECISIONS

1. In general.

Outside of the constitutional powers bestowed upon the board of levee commissioners by Miss. Const. Art. XI, § 227 et seq., the board is subject to the supervision and control of the legislature and can exercise, unless the constitution otherwise provides, only such powers as may be delegated to it by the legislature; similarly, board funds are properly considered subject to legislative control absent constitutional provisions otherwise. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

§ 231. Election of commissioners.

Editor's Note — Laws of 2010, ch. 438, § 1 provides:

"SECTION 1. Section 3, Chapter 85, Laws of 1930, as amended by Section 3, Chapter 574, Laws of 1968, is amended as follows:

"Section 3. The elections to be held as provided for in Section 4 and Section 5 of Chapter 85, Laws of 1930, shall be general elections, and runoff general elections shall be held three (3) weeks thereafter. Any candidate who receives a majority of all the votes cast for that office in the general election shall thereby be elected. If no candidate receives such majority of popular votes in the general election then the two (2) candidates who receive the highest popular vote for such office shall have their names submitted as such candidates to the runoff general election, and the candidate who leads in such runoff general election shall thereby be elected to the office. When there is a tie in the first general election of those receiving next highest vote, these two (2) shall be decided by lot, fairly and publicly drawn under the supervision of the commissioners and with the aid of two (2) or more respectable electors, and the candidate determined by lot and the one (1) receiving the highest vote, neither having received a majority, shall go into the runoff general election and whoever leads in such runoff general election shall thereby be elected. The provisions of this chapter shall in no way amend any chapter regulating the Yazoo Mississippi Delta Levee District."

Laws of 2010, ch. 438, §§ 3 and 4 provides:

"SECTION 3. The Attorney General of the State of Mississippi shall submit this act, immediately upon approval by the Governor, or upon approval by the Legislature subsequent to a veto, to the Attorney General of the United States or to the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 4. This act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended."

As of July 20, 2010, preclearance for Laws of 2010, ch. 438, has not been received and a 60-day review period recommenced on that date.

§ 232. Duties and powers of commissioners.

JUDICIAL DECISIONS

1. Powers and functions of levee board.

Bill requiring a board of levee commissioners to transfer funds to a state budget contingency fund was unconstitutional because it mandated that the board's funds be used for non-levee purposes, which plainly conflicted with the clear language of Miss. Const. Art. XI, § 232 and Miss. Const. Art. XI, § 236 requiring board funds to be used only to erect, maintain, and repair the levee system. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

§ 236. Levee taxes.

JUDICIAL DECISIONS

1. Power of legislature.

Bill requiring a board of levee commissioners to transfer funds to a state budget contingency fund was unconstitutional because it mandated that the board's funds be used for non-levee purposes, which plainly conflicted with the clear language of Miss. Const. Art. XI, § 232 and Miss. Const. Art. XI, § 236 requiring board funds to be used only to erect, maintain, and repair the levee system. State v. Bd. of Levee Comm'rs, 932 So. 2d 12 (Miss. 2006).

ARTICLE 12.

FRANCHISE.

§ 241. Qualifications for electors.

Cross References — Legislature authorized to prescribe and enforce additional elector qualifications, see Miss. Const. Art. 12, § 244A.

JUDICIAL DECISIONS

3. Residence.
6. Disqualification for conviction of crime.

3. Residence.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

6. Disqualification for conviction of crime.

Felons' action, claiming that the state violated the Fourteenth Amendment and the National Voter Registration Act when it denied them the right to vote in a presidential election, was properly dismissed because the final clause of Miss. Const. Art. 12, § 241 was not an exception to the preceding bar on felon voting; there was no principled reason that the presidential election clause would grant only felons the right to vote in presidential elections while leaving the other qualifications of Miss. Const. Art. 12, § 241 intact, and accepting the state's longstanding, commonsense interpretation of the provision both avoided the constitutional issue and demonstrated respect for the state's interpretation of its own laws. Young v. Hosemann, 598 F.3d 184 (5th Cir. 2010).

The final clause of Miss. Const. Art. 12, § 241 is not an exception to the preceding

bar on voting by convicted feloons, but rather, means that for presidential elections, a voter must meet the requirements established by Congress in addition to being otherwise a qualified elector under § 241. There is no principled reason that the presidential election clause in § 241 would grant only felons the right to vote in presidential elections while leaving the other qualifications of § 241 intact. Young v. Hosemann, 598 F.3d 184 (5th Cir. 2010).

ATTORNEY GENERAL OPINIONS

The name of one convicted of the crime of receiving stolen property must be removed from the voter rolls. Dill, Apr. 1, 2005, A.G. Op. 05-0145.

Only convictions of disenfranchising crimes committed under the jurisdiction of this State affect one's right to vote; therefore, convictions in federal courts are not disenfranchising. Wiggins, Apr. 26, 2005, A.G. Op. 05-0193.

Since one convicted of the crime of looting may or may not have taken property, looting does not necessarily constitute theft and is not a disenfranchising crime. Loftin, Sept. 6, 2006, A.G. Op. 06-0386.

RESEARCH REFERENCES

ALR. Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

§ 244A. Additional qualifications for voter registration.

Cross References — Elector qualifications, including minimum age, citizenship, residency, and felony conviction status, see Miss. Const. Art. 12, § 241.

§ 250. Qualified electors eligible for office.

JUDICIAL DECISIONS

3. Offices subject to constitutional qualifications.

Candidate was a qualified candidate for the position of justice court judge, even though the candidate did not live within the election subdistrict where the candidate wished to run for office. Montgomery v. Lowndes County Democratic Exec. Comm., 969 So. 2d 1 (Miss. 2007).

ATTORNEY GENERAL OPINIONS

Proposed amendment to municipal charter regarding residency requirements for candidates for office would not be consistent with state laws or the state Constitution. McFatter, May 30, 2003, A.G. Op. 03-0247.

In order to be a qualified elector of a supervisor district one must reside within the boundaries of that district; therefore, one may not be certified as a candidate for supervisor of a district in which he does not reside. McMullin, Apr. 18, 2003, A.G. Op. #03-0171.

§ 253. Restoration of right of suffrage after crime.

RESEARCH REFERENCES

ALR. Validity, construction, and application of state criminal disenfranchisement provisions. 10 A.L.R.6th 31.

Article 14.

General Provisions.

§ 258. Credit of State.

ATTORNEY GENERAL OPINIONS

County hospital may not effect the issuance of an irrevocable letter of credit by a bank in favor of the insurance carrier in any amount. Yarborough, June 6, 2003, A.G. Op. 03-0255.

§ 261. Expenses of criminal prosecutions; fines, forfeitures and costs.

ATTORNEY GENERAL OPINIONS

Jury costs may be assessed against a defendant that is convicted. Based on Section 25-7-63, jurors summoned for justice court jury duty are entitled to the per diem established by statute only if they are chosen for the jury or as alternates. Jurors are only entitled to the authorized per diem and not a per diem plus meals. Riley, June 6, 2003, A.G. Op. 03-0260.

§ 262. Asylums for the aged or infirm.

ATTORNEY GENERAL OPINIONS

A county has a duty to provide for it's destitute aged citizens. Shepard, Aug. 23, 2004, A.G. Op. 04-0322.

§ 266. Holding office under federal or foreign government.

ATTORNEY GENERAL OPINIONS

This Constitutional provision would prohibit a member of the county board of supervisors from also being employed as a mail carrier for the U.S. Postal Office. Abron, June, 21, 2004, A.G. Op. 04-0241.

An enlisted member of the National Guard does not hold a federal office within the meaning of this section. Weissinger, Apr. 8, 2005, A.G. Op. 05-0147.

Article 15.

Amendments to the Constitution.

In General.

IN GENERAL

Sec.
273. Amendment process.

§ 273. Amendment process.

(1) Amendments to this Constitution may be proposed by the Legislature or by initiative of the people.

(2) Whenever two-thirds (⅔) of each house of the Legislature, which two-thirds (⅔) shall consist of not less than a majority of the members elected to each house, shall deem any change, alteration or amendment necessary to this Constitution, such proposed amendment, change or alteration shall be read and passed by two-thirds (⅔) vote of each house, as herein provided; public notice shall then be given by the Secretary of State at least thirty (30) days preceding an election, at which the qualified electors shall vote directly for or against such change, alteration or amendment, and if more than one (1) amendment shall be submitted at one (1) time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately; and, notwithstanding the division of the Constitution into sections, the Legislature may provide in its resolution for one or more amendments pertaining and relating to the same subject or subject matter, and may provide for one or more amendments to an article of the Constitution pertaining and relating to the same subject or subject matter, which may be included in and voted on as one (1) amendment; and if it shall appear that a majority of the qualified electors voting directly for or against the same shall have voted for the proposed change, alteration or amendment, then it shall be inserted as a part of the Constitution by proclamation of the Secretary of State certifying that it received the majority vote required by the Constitution; and the resolution may fix the date and direct the calling of elections for the purposes hereof.

(3) The people reserve unto themselves the power to propose and enact constitutional amendments by initiative. An initiative to amend the Constitution may be proposed by a petition signed over a twelve-month period by qualified electors equal in number to at least twelve percent (12%) of the votes for all candidates for Governor in the last gubernatorial election. The signatures of the qualified electors from any congressional district shall not exceed one-fifth (⅕) of the total number of signatures required to qualify an initiative petition for placement upon the ballot. If an initiative petition contains signatures from a single congressional district which exceed one-fifth (⅕) of the total number of required signatures, the excess number of signatures from that

congressional district shall not be considered by the Secretary of State in determining whether the petition qualifies for placement on the ballot.

(4) The sponsor of an initiative shall identify in the text of the initiative the amount and source of revenue required to implement the initiative. If the initiative requires a reduction in any source of government revenue, or a reallocation of funding from currently funded programs, the sponsor shall identify in the text of the initiative the program or programs whose funding must be reduced or eliminated to implement the initiative. Compliance with this requirement shall not be a violation of the subject matter requirements of this section of the Constitution.

(5) The initiative process shall not be used:

(a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution;

(b) To amend or repeal any law or any provision of the Constitution relating to the Mississippi Public Employees' Retirement System;

(c) To amend or repeal the constitutional guarantee that the right of any person to work shall not be denied or abridged on account of membership or nonmembership in any labor union or organization; or

(d) To modify the initiative process for proposing amendments to this Constitution.

(6) The Secretary of State shall file with the Clerk of the House and the Secretary of the Senate the complete text of the certified initiative on the first day of the regular session. A constitutional initiative may be adopted by a majority vote of each house of the Legislature. If the initiative is adopted, amended or rejected by the Legislature; or if no action is taken within four (4) months of the date that the initiative is filed with the Legislature, the Secretary of State shall place the initiative on the ballot for the next statewide general election.

The chief legislative budget officer shall prepare a fiscal analysis of each initiative and each legislative alternative. A summary of each fiscal analysis shall appear on the ballot.

(7) If the Legislature amends an initiative, the amended version and the original initiative shall be submitted to the electors. An initiative or legislative alternative must receive a majority of the votes thereon and not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted to be approved. If conflicting initiatives or legislative alternatives are approved at the same election, the initiative or legislative alternative receiving the highest number of affirmative votes shall prevail.

(8) If an initiative measure proposed to the Legislature has been rejected by the Legislature and an alternative measure is passed by the Legislature in lieu thereof, the ballot titles of both such measures shall be so printed on the official ballots that a voter can express separately two (2) preferences: First, by voting for the approval of either measure or against both measures, and, secondly, by voting for one measure or the other measure. If the majority of those voting on the first issue is against both measures, then both measures fail, but in that case the votes on the second issue nevertheless shall be

carefully counted and made public. If a majority voting on the first issue is for the approval of either measure, then the measure receiving a majority of the votes on the second issue and also receiving not less than forty percent (40%) of the total votes cast at the election at which the measure was submitted for approval shall be law. Any person who votes for the ratification of either measure on the first issue must vote for one (1) of the measures on the second issue in order for the ballot to be valid. Any person who votes against both measures on the first issue may vote but shall not be required to vote for any of the measures on the second issue in order for the ballot to be valid. Substantially the following form shall be a compliance with this subsection:

INITIATED BY PETITION AND ALTERNATIVE BY LEGISLATURE

Initiative Measure No. _____, entitled (here insert the ballot title of the initiative measure).

Alternative Measure No. _____ A, entitled (here insert the ballot title of the alternative measure).

VOTE FOR APPROVAL OF EITHER, OR AGAINST BOTH:

FOR APPROVAL OF EITHER Initiative No. ____
OR Alternative No. ____ A .....( )
AGAINST Both Initiative No. ____
AND Alternative No. ____ A .....( )

AND VOTE FOR ONE

FOR Initiative Measure No. ____ .....( )
FOR Alternative Measure No. ____ A .....( )

(9) No more than five (5) initiative proposals shall be submitted to the voters on a single ballot, and the first five (5) initiative proposals submitted to the Secretary of State with sufficient petitions shall be the proposals which are submitted to the voters. The sufficiency of petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the state, which shall have original and exclusive jurisdiction over all such cases.

(10) An initiative approved by the electors shall take effect thirty (30) days from the date of the official declaration of the vote by the Secretary of State, unless the measure provides otherwise.

(11) If any amendment to the Constitution proposed by initiative petition is rejected by a majority of the qualified electors voting thereon, no initiative petition proposing the same, or substantially the same, amendment shall be submitted to the electors for at least two (2) years after the date of the election on such amendment.

(12) The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified. To prevent signature

fraud and to maintain the integrity of the initiative process the state has a compelling interest in insuring that no person shall circulate an initiative petition or obtain signatures on an initiative petition unless the person is a resident of this state at the time of circulation. For the purposes of this subsection the term "resident" means a person who is domiciled in Mississippi as evidenced by an intent to maintain a principal dwelling place in Mississippi indefinitely and to return to Mississippi if temporarily absent, coupled with an act or acts consistent with that intent. Every person who circulates an initiative petition shall print and sign his name on each page of an initiative petition, or on a separate page attached to each page, certifying that he was a resident of this state at the time of circulating the petition. The Secretary of State shall refuse to accept for filing any page of an initiative petition upon which the signatures appearing thereon were obtained by a person who was not a resident of this state at the time of circulating the petition, and an initiative measure shall not be placed on the ballot if the Secretary of State determines that without such signatures the petition clearly bears an insufficient number of signatures. The provisions of this subsection (12) shall be applicable to all initiative measures that have not been placed on the ballot at the time this proposed amendment is ratified by the electorate.

(13) The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people.

SOURCES: 1817 art "Mode of Revising," etc. § 1; 1832 art "Mode of Revising," etc. § 1; 1869 art 13; Laws, 1912 ch 416; Laws, 1959 Ex Sess, ch 78; Laws, 1989, ch. 702; Laws, 1992, ch. 715; Laws, 1998, ch. 619, eff November 30, 1998.

Editor's Note — This section is set out to correct a typographical error in the fourth sentence of (12). At the direction of the co-counsel of the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, "an" was changed to "on" so that "initiative petition, or an a separate page" reads "initiative petition, or on a separate page."

TITLE 1

LAWS AND STATUTES

CHAPTER 1

Code of 1972

IN GENERAL

§ 1-1-11. Distribution of the Code of 1972.

(1) Except as provided in subsection (2) of this section, the Joint Committee on Compilation, Revision and Publication of Legislation shall distribute or provide for the distribution of the sets of the compilation of the Mississippi Code of 1972 purchased by the state as follows:

Fifty-seven (57) sets to the Mississippi House of Representatives and forty (40) sets to the Mississippi Senate for the use of the Legislative Reference Bureau, Legislative Services Offices, staffs and committees thereof.

Ten (10) sets to the Governor's Office; nine (9) sets to the Secretary of State; and twenty (20) sets to the Auditor's Office.

One (1) set to each of the following: the Lieutenant Governor; each member of the Legislature; the Treasurer; each district attorney; each county attorney; each judge of the Court of Appeals and each judge of the Supreme, circuit, chancery, county, family, justice and municipal courts; each Mississippi Senator and Mississippi Representative in Congress; State Superintendent of Education; Director of the Department of Finance and Administration; six (6) sets to the Performance Evaluation and Expenditure Review (PEER) Committee; three (3) sets to the Director of the Legislative Budget Office; the Commissioner of Agriculture and Commerce; each Mississippi Transportation Commissioner; six (6) sets to the Department of Corrections; the Insurance Commissioner; the Clerk of the Supreme Court; the State Board of Health; each circuit clerk; each chancery clerk in the state for the use of the chancery clerk and the board of supervisors; each sheriff in the state for the use of his office and the county officers; and each county for the county library (and an additional set shall be given to each circuit clerk, chancery clerk, sheriff and county library in counties having two (2) judicial districts).

Two (2) sets to the Department of Archives and History; two (2) sets to the State Soil and Water Conservation Commission; sixty-eight (68) sets to the Attorney General's office; six (6) sets to the Public Service Commission; four (4) sets to the Public Utilities Staff; thirty-five (35) sets to the Department of Revenue; one (1) set to the Board of Tax Appeals; two (2) sets to the State Personnel Board; six (6) sets to the State Law Library; one (1) set to the Library of Congress; ten (10) sets to the University of Mississippi Law School; one (1) set each to the Mississippi School for the Deaf and the Mississippi School for the Blind; one (1) set each to the University of Mississippi, Mississippi State University, Mississippi University for Women, University of Southern Mississippi, Delta State University, Alcorn State University, Jackson State University, Mississippi Valley State University, and the Board of Trustees of State Institutions of Higher Learning; and one (1) set to the Supreme Court judges' conference room. In furtherance of the State Library's reciprocal program of code exchange with libraries of the several states, the joint committee shall, at the direction and only upon the written request of the State Librarian, distribute or provide for the distribution of sets of the code to such libraries.

One (1) set to each state junior or community college; three (3) sets to the Department of Wildlife, Fisheries and Parks; two (2) sets to the Department of Environmental Quality; two (2) sets to the Department of Marine Resources; two (2) sets to the Mississippi Ethics Commission; six (6) sets to the Mississippi Workers' Compensation Commission; four (4) sets to the State Department of Rehabilitation Services; and seven (7) sets to the Department of Human Services. One (1) set to each of the following: State Textbook Procurement Commission; University Medical Center; State Library Commission; Department of Agriculture and Commerce; Forestry Commission; and seventeen (17) sets to the Department of Public Safety. Also, one (1) set to each of the following: Adjutant General, Mississippi Development Authority, Department of Banking and Consumer Finance, Bureau of Building, Grounds and Real Property Management, the State Educational Finance Commission, the Mississippi Board of Vocational and Technical Education, Division of Medicaid, State Board of Mental Health, and Department of Youth Services.

The joint committee is authorized to distribute or provide for the distribution of additional sets of the Mississippi Code, not to exceed three (3) sets, to the office of each district attorney for the use of his assistants.

The joint committee shall provide to the Mississippi House of Representatives and the Mississippi Senate the annual supplements to the Mississippi Code of 1972 for each set of the code maintained by the House and Senate.

The set of the Mississippi Code of 1972 to be provided to each member of the Legislature shall be provided unless specifically waived by such legislator in writing.

An elected or appointed officeholder in the State of Mississippi, except for a member of the Legislature, shall deliver to his successor in office, or to the joint committee if there is no successor, the set of the Mississippi Code of 1972 provided the officeholder under this section.

Before the joint committee delivers or provides for delivery of a copy of the Mississippi Code of 1972 to an individual officeholder, the joint committee shall prepare and submit a written agreement to the officeholder. The agreement shall, among other provisions, state that the code is the property of the State of Mississippi, that it shall be transferred to the officeholder's successor in office, that the officeholder has an obligation to make such transfer and that the officeholder shall be responsible for the failure to deliver the code and for any damage or destruction to the code, normal wear and tear excepted. The joint committee shall execute the agreement and forward it to the officeholder for execution. The joint committee shall not deliver or provide for delivery of the code to the officeholder until the executed agreement is received by the committee. The joint committee may include in the agreement such other provisions as it may deem reasonable and necessary. In addition to damages or any other remedy for not transferring a set of the code to his successor, an officeholder who does not transfer his set of the code shall be guilty of a misdemeanor and shall, upon conviction, pay a fine of One Thousand Dollars ($1,000.00). Upon request of the joint committee, the Attorney General shall assist the joint committee in taking such actions as necessary to require an officeholder to transfer the set of code provided under this section to his successor, or to the joint committee if there is no successor, and to recover reimbursement or damages from any officeholder for the loss of or damage or destruction to any volumes of the set of the code provided under this section, other than normal wear and tear.

Replacement of missing, damaged or destroyed sets or volumes of the code provided by this chapter may be obtained from the code publisher through the joint committee at the established state cost, the cost to be borne by the recipient.

No more than one (1) set of the Mississippi Code of 1972 shall be furnished to any one (1) individual, regardless of the office or offices he may hold.

(2)(a) The joint committee, in its discretion, may determine whether electronic access to the Mississippi Code of 1972 is available and a sufficient substitute for actual bound volumes of the code and, if so, may omit furnishing any one or more sets otherwise required by this section.

(b) Each elected state official, elected state district official and member of the Legislature shall receive a CD-ROM version of the Mississippi Code of 1972 in lieu of bound volumes of the Mississippi Code of 1972 unless the official or member of the Legislature makes a request in writing to the Joint Committee on Compilation, Revision and Publication of Legislation that he receive bound volumes of the Mississippi Code of 1972.

SOURCES: Codes, 1942, § 7; Laws, 1942, ch. 318; Laws, 1944, ch. 314; Laws, 1966, ch. 395, § 1; Laws, 1973, ch. 425, § 1; Laws, 1974, ch. 377; Laws, 1978, ch. 458, § 4; Laws, 1981, ch. 536, § 1; Laws, 1988, ch. 486, § 1; Laws, 1988, ch. 518, § 14; Laws, 1990, ch. 402, § 1; Laws, 1991, ch. 530, § 6; Laws, 1992, ch. 543, § 11; Laws, 1993, ch. 430, § 8; Laws, 1993, ch. 518, § 8; Laws, 1997, ch. 385, § 1; Laws, 1998, ch. 325, § 1; Laws, 1998, ch. 546, § 3; Laws, 1999, ch.

310, § 1; Laws, 2000, ch. 511, § 1; Laws, 2003, ch. 551, § 1; Laws, 2009, ch. 492, § 7; Laws, 2010, ch. 376, § 1, eff from and after July 1, 2010.

Editor's Note — Laws of 2009, ch. 492, § 144 provides:

"SECTION 144. Nothing in this act shall affect or defeat any assessment, refund claim, request for waiver of a tax penalty, the suspension, revocation, surrender, seizure or denial of permit, tag or title, the suspension, revocation or denial of a permit, approved manager status, qualified resort area or forfeiture under the Local Option Alcoholic Beverage Control Law, Section 67-1-1 et seq., the administrative appeal or judicial appeal of any of the foregoing acts or any other action taken by the Mississippi State Tax Commission or by the Chairman of the Mississippi State Tax Commission prior to the effective date of this act. The provisions of the laws relating to the administrative appeal or judicial review of such actions which were in effect prior to the effective date of this act are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review, where previously provided, of such actions, except to the extent that any matter is pending on an administrative appeal before the three (3) member Mississippi State Tax Commission on the effective date will after the effective date of this act be heard and decided by the Board of Tax Appeals as the successor of the Mississippi State Tax Commission in regard to administrative appeals."

Amendment Notes — The 2009 amendment, effective July 1, 2010, in (1), rewrote the first sentence in the fourth paragraph, and inserted "Mississippi Development Authority" following "Adjutant General" in the last sentence of the fifth paragraph.

The 2010 amendment redesignated former (2) as (2)(a); and added (2)(b).

SUPPLEMENTATION OF CODE OF 1972 AND UPDATE OF COMPUTER TAPES

SEC.

§ 1-1-53. Repealed.

Repealed by operation of law on July 1, 1998.

§ 1-1-53. [Laws, 1973, ch. 366, § 2; Laws, 1996, ch. 502, § 10, eff from and after passage (approved April 11, 1996).]

Editor's Note — Former § 1-1-53 pertained to the requirement that a manuscript of compiled and annotated acts from each regular session of the Legislature be submitted to the Attorney General for approval. For present provisions regarding publication of legislative acts, see §§ 1-1-101 et seq.

§ 1-1-55. Repealed.

Repealed by operation of law on July 1, 1998.

§ 1-1-55. [Laws, 1973, ch. 366, § 3; Laws, 1979, ch. 323, § 1; Laws, 1996, ch. 502, § 11, eff from and after passage (approved April 11, 1996).]

Editor's Note — Former § 1-1-55 provided for the printing of the approved manuscript of compiled and annotated acts from each regular Legislative session in insertable pocket supplement form or replacement bound volumes. For present provisions regarding publication of legislative acts, see §§ 1-1-101 et seq.

JOINT LEGISLATIVE COMMITTEE ON COMPILATION, REVISION AND PUBLICATION OF LEGISLATION

SEC.

§ 1-1-103. Creation of Joint Legislative Committee on Compilation, Revision and Publication of Legislation; composition; appointment and compensation of members; chairman; attendance at meetings by proxies; transaction of business by committee; meetings; payment of expenses.

(1) There is created the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, which is hereinafter referred to as the "joint committee." The joint committee shall be composed of the Speaker of the House of Representatives, the Lieutenant Governor of the State of Mississippi, the Speaker Pro Tempore of the House of Representatives, the President Pro Tempore of the Mississippi State Senate, the Chairman of the Rules Committee of the House of Representatives, the Chairman of the Senate Rules Committee, four (4) members of the House of Representatives to be named by the Speaker of the House, and four (4) members of the Senate to be named by the Lieutenant Governor. If any ex officio member of the joint committee holds two (2) positions entitling him to membership on the committee, the Speaker of the House or the Lieutenant Governor, as the case may be, shall appoint another member of the respective house to membership on the committee. The chairmanship of the committee shall alternate for twelve-month periods, beginning on May 1 of each year, between the Speaker of the House of Representatives and the Lieutenant Governor, with the Speaker of the House of Representatives serving as the first chairman. In the absence of the Chairman of the House Rules Committee or of the Senate Rules Committee, the vice chairman of that committee shall be entitled to attend; if the vice chairman is unable to attend or if an appointed member is unable to attend, another legislator may be designated to attend by the Speaker of the House or the Lieutenant Governor, as the case may be. If the Speaker of the House or the Lieutenant Governor is unable to attend a meeting, he may designate a legislator to substitute for him at that meeting. Any person serving as such a designated proxy shall have a vote at the meeting he was selected to attend and also when attending, shall receive compensation and expenses in the same manner and amount as regular members of the joint committee.

There shall be no business transacted, including adoption of rules of procedure, without the presence of a quorum of the joint committee. A quorum shall be eight (8) members, to consist of four (4) members from the House of Representatives and four (4) members from the Senate. No action shall be valid unless approved by the majority of those members present and voting,

entered upon the minutes of the joint committee and signed by the chairman and vice chairman.

(2) In addition to their legislative salaries as provided by law, the members of the committee shall receive per diem as authorized by law for their services in carrying out the duties of the committee and, in addition thereto, shall receive a daily expense allowance equal to the maximum daily expense rate allowable to employees of the federal government for travel in the high rate geographical area of Jackson, Mississippi, as may be established by federal regulations, including mileage as authorized by Section 25-3-41. However, in no case shall the members of the committee draw per diem while the Legislature is in regular or special session, except that members may receive the per diem and expenses authorized by this section when the Legislature is in session but in recess under the terms of a concurrent resolution, or in recess during a special session.

(3) The committee shall meet at least one (1) time during the interim that the Legislature is not in regular session, and the chairman may call additional meetings at such times as he deems necessary or advisable.

(4) All expenses incurred by and on behalf of the committee shall be paid from funds appropriated therefor, or from a sum to be provided in equal portion from the contingency funds of the House of Representatives and the Senate.

(5) Upon the request of the joint committee, the Attorney General shall provide legal assistance or legal representation to the committee on any matter within the jurisdiction of the committee, including bringing suits on behalf of the committee and representing the committee in any suits brought against the committee.

SOURCES: Laws, 1996, ch. 502, § 2; Laws, 1998, ch. 546, § 1; Laws, 2009, ch. 483, § 3, eff from and after passage (approved Apr. 3, 2009.)

Editor's Note — Laws of 2011, ch. 506, § 2, provides:

"SECTION 2. On or before July 1 of each fiscal year, or at such other times as necessary, the Clerk of the House of Representatives or the Secretary of the Senate ('the Legislature') shall submit a request to the State Fiscal Officer for the funds necessary to pay (a) the expenses of the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, (b) the state's share of various assessments from legislative-related organizations, and (c) any other legislative-related expenses. The State Fiscal Officer shall transfer to the Legislature the amount or amounts as requested by the Legislature from the Secretary of State's Fund No. 3111. The State Fiscal Officer shall transfer such obligated funds in a timely manner as determined by the Legislature. The Legislature is authorized to escalate the appropriate budgets during the fiscal year by the respective amounts transferred and to expend those sums for the purposes authorized by law."

On April 26, 2011, the Governor vetoed Section 2 of Chapter 506, Laws of 2011.

On June 1, 2011, the Mississippi Attorney General issued the following opinion regarding the constitutionality of the Governor's partial veto of Chapter 506, Laws of 2011:

"Honorable Johnny W. Stringer
"Chairman, House Appropriations Committee
"P. O. Box 1018
"Jackson, MS 39215-1018

"Re: Partial veto under Section 73 of the Mississippi Constitution

"Dear Chairman Stringer:

"Attorney General Jim Hood received your request and assigned it to me for research and response.

"Issue Presented

"Does the Governor under his partial veto authority of Section 73 of the Mississippi Constitution of 1890 have authority to veto a section of a general bill that he asserts is an appropriation within the general bill, when that section does not meet the criteria for an appropriation bill under the Mississippi Constitution?

"Response

"No. House Bill No.1 054 of the 2011 Regular Session, which is the subject of your request, is not an appropriation bill and is not subject to partial veto under Section 73 of the Mississippi Constitution of 1890.

"Background

"On April 26, 2011, the Governor returned House Bill No. 1054 to the House of Representatives with a partial veto message for Section 2 of the bill. House Bill No. 1054, which is generally known as the 'transfer bill,' is a bill that, among other things, provides for the transfer of state funds into certain accounts for use in the general fund appropriations process. The Governor said in his message that he was not concerned with the transfer components of the bill, but had concerns specifically with Section 2 of the bill.

"Applicable Law and Discussion

"Under the Mississippi Constitution of 1890 (hereinafter 'Mississippi Constitution'), the powers of government are divided between and among three separate and distinct departments, to wit, the legislative department, the executive department and the judicial department. Miss. Const. Art. 1, Sec. 1 (1890). No person belonging to one department is authorized to exercise core powers belonging to another department. Miss. Const. Art. 1, Sec. 2 (1890); Dye v. State ex rel. Hale, 507 So. 2d 332 at 343 (Miss. 1987); and Alexander v. State ex rel. Alain, 441 So. 2d 1329 (Miss. 1983).

"The enactment of laws is an exercise of legislative power, which is subject to the executive power of veto. The Mississippi Constitution authorizes two types of vetoes, one which is applicable to all bills and is total in nature and another which is applicable only to appropriation bills and is partial in nature.

"Section 72[1] authorizes the Governor to approve or disapprove, by way of veto, every bill that passes both houses of the Legislature:

"Every Bill which shall pass both Houses shall be presented to the Governor of the state. If he approve, he shall sign it; but if he does not approve, he shall return it, with his objections, to the House in which it originated, which shall enter the objections at large upon its Journal, and proceed to reconsider it. If after such reconsideration two-thirds (⅔) of that House shall agree to pass the Bill, it shall be sent, with the objections, to the other House, by which, likewise, it shall be reconsidered; and if approved by two-thirds (⅔) of that House, it shall become a law; but in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the Governor within five (5) days (Sundays excepted) after it has been presented to him, it shall become a law in like manner as if he had signed it, unless the Legislature, by adjournment, prevented its return, in which case such Bill shall be a law unless the Governor shall veto it within fifteen (15) days (Sundays excepted) after it is presented to him, and such Bill shall be returned to the Legislature, with his objections, within three (3) days after the beginning of the next session of the Legislature.

"In exercising the gubernatorial veto under Section 72, the Governor must veto the entire bill. There is no power to approve parts of a bill, while disapproving other parts.

[1] Unless otherwise indicated all section numbers refer to sections of the Mississippi Constitution of 1890.

"In contrast, Section 73 authorizes the Governor to veto parts and approve parts of any 'appropriation bill':

"The governor may veto parts of any appropriation bill, and approve parts of the same, and the portions approved shall be law.

"The power to approve parts of a bill, while vetoing or disapproving other parts of the same bill, is expressly limited to appropriation bills and may not be exercised with regard to other legislation. An attempt to partially veto any bill other than an appropriation bill would be outside the authority granted to the Governor under the Mississippi Constitution and would be an impermissible infringement of the powers of the Legislature.

"The Mississippi Supreme Court in *Fordice v. Bryan,*651 So. 2d 998 (Miss. 1995), a case involving the exercise of a partial veto, stated:

"Article IV, Section 73 of the Mississippi Constitution of 1890 states: 'The governor may veto *parts* of any *appropriation bill*, and approve parts of the same, and the portions approved shall be law.' Miss. Const. art. IV, Section 73 (emphasis added). Therefore, the Governor is entitled to exercise his Section 73 veto power upon 'parts' of 'appropriation' bills, and only upon 'parts' of 'appropriation' bills. The Governor may not exercise the Section 73 partial veto power on revenue raising bond bills.

"In order for the bills to be susceptible to the Governor's Section 73 partial veto power, they must fix a definite maximum amount, Section 63, and not continue to be in force withdrawing money from the state treasury longer than two months after the expiration of the fiscal year ending after the meeting of the legislature at its next regular session, Section 64. 651 So. 2d 998, 1000.

"Although there is no definition of 'appropriation bill' in the Mississippi Constitution, there are mandatory requirements for appropriation bills contained therein. Section 63, which requires an appropriation bill to state the maximum sum authorized to be drawn from the State Treasury, states:

"No appropriation bill shall be passed by the legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury.

"Section 64, which provides that bills making appropriations out of the State Treasury only be in force no more than two months after the expiration of the fiscal year, states:

"No bill passed after the adoption of this Constitution to make appropriations of money out of the state treasury shall continue in force more than two months after the expiration of the fiscal year ending after the meeting of the legislature at its next regular session; nor shall such bill be passed except by the votes of a majority of all members elected to each house of the legislature.

"Section 69 prescribes the contents of appropriation bills and prohibits the engrafting of other legislation therein and reads as follows:

"General appropriation bills shall contain only the appropriations to defray the ordinary expenses of the executive, legislative, and judicial departments of the government; to pay interest on state bonds, and to support the common schools. All other appropriations shall be made by separate bills, each embracing but one subject. Legislation shall not be engrafted on the appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid.

"Section 68 provides that appropriation bills (and revenue bills) have precedence in the Legislature over all other business:

"Appropriation and revenue bills shall, at regular sessions of the legislature, have precedence in both houses over all other business, and no such bills shall be passed during the last five days of the session.

"Under the Joint Rules of the Senate and the House, appropriation bills and revenue bills are subject to deadlines during the legislative session which are different from other bills. See Joint Rule 40 (2011).

"In accordance with *Fordice v. Bryan, supra*, the validity of a partial veto under Section 73 depends on the nature of the bill itself, i.e., is House Bill No.1054 an

appropriation bill subject to partial veto under Section 73 or is it a general bill subject only to the general veto provisions of Section 72? If House Bill No. 1054 is not an appropriation bill, then it is not subject to partial veto under Section 73.

"To determine whether House Bill No. 1054 is an appropriation bill, it is necessary (1) to examine and compare its provisions with the constitutional sections which prescribe the mandatory provisions of an appropriations bill and (2) to examine the legislative process in which House Bill No. 1054 came to be enacted, i.e., was House Bill No. 1054 handled procedurally as an appropriation bill?

"House Bill No.1054 contains no maximum amount which may be withdrawn from the Treasury as required by Section 63. House Bill No.1054 is not limited in duration to no more than two months after the expiration of the fiscal year as required by Section 64. Its contents are not limited to appropriations defraying the expenses of State government, paying interest on state bonds, and supporting the common schools as required by Section 69.

"In addition to not satisfying the constitutional requirements of appropriation bills, House Bill No.1054 contains provisions commonly seen in general bills. For example, House Bill No.1054 *inter alia* authorizes a half dozen transfers of funds making it similar to 'transfer bills' in previous legislative sessions, which were also treated procedurally by the Legislature as general bills. House Bill No.1059, 2010 Regular Session and House Bill No. 1505, 2009 Regular Session. In addition, House Bill No. 1054 authorizes the borrowing of special funds to offset any temporary cash flow deficiency in the Health Care Expendable Fund. It provides that certain funds held for veterans by the State Veterans Home shall be considered to be held in a fiduciary capacity for the benefit of the veterans. House Bill No.1054 also revises the time limit in which a resident of the coastal counties, whose residence was destroyed by Hurricane Katrina, must begin construction in order to not be required to meet current lot size requirements. These provisions are all similar in nature to other provisions commonly found in general bills.

"Section 2 of House Bill No. 1054, which was the subject of the Governor's veto message, reads as follows:

"On or before July 1 of each fiscal year, or at such other times as necessary, the Clerk of the House of Representatives or the Secretary of the Senate ('the Legislature') shall submit a request to the State Fiscal Officer for the funds necessary to pay (a) the expenses of the Joint Legislative Committee on Compilation, Revision and Publication of Legislation, (b) the state's share of various assessments from legislative-related organizations, and (c) any other legislative-related expenses. The State Fiscal Officer shall transfer to the Legislature the amount or amounts as requested by the Legislature from the Secretary of State's Fund No. 3111. The State Fiscal Officer shall transfer such obligated funds in a timely manner as determined by the Legislature. The Legislature is authorized to escalate the appropriate budgets during the fiscal year by the respective amounts transferred and to expend those sums for the purposes authorized by law.

"Briefly stated, Section 2 of House Bill No. 1054 authorizes the transfer of funds from the Secretary of State's Fund No. 3111[2], the escalation of the Legislature's budget by amounts transferred from Fund No. 3111, and the payment of legislative expenses specified therein.

"While Section 2 of House Bill No. 1054 authorizes the expenditure of public funds, it does not do so within the framework of an appropriation bill. Appropriation bills are not the exclusive legislative vehicle for authorizing the expenditure of public funds. As you note in your letter of request, the Department of Finance and Administration is authorized by Section 7-1-255 of the Mississippi Code, a general law provision, to escalate its budget based on application fees it receives. Similarly, the Department of Audit is authorized by Section 7-7-81 (2) of the Mississippi Code, another general law

[2] Fund No. 3111 contains special funds which are generated by fees earned by the Secretary of State and the Legislature appropriates funds therefrom for some of the operations of the Secretary of State's office.

provision, to escalate its budget based on funds deposited in the 'Auditor's Enhanced Accountability Fund.' Upon each agency's respective budget being escalated, these Code sections authorize the Department of Finance and Administration and the Department of Audit to expend available funds. No further action of the Legislature is necessary. You list thirteen other examples of escalation and expenditure authority by general laws in your letter.[3]

"In addition, bond bills, specifically found not to be appropriation bills in *Fordice v. Bryan,* supra, and, therefore, not subject to partial veto, typically authorize the expenditure of public funds after bonds are issued without any further act of the Legislature. Similarly, legislation establishing revolving funds, though not appropriation bills, generally authorize the expenditure of public funds without any further act of the Legislature.

"The provisions in Section 2 of House Bill No.1054 are similar to the general law escalation provisions mentioned above and the thirteen other general law examples referenced in your letter. Once the transfer of funds is made from Fund No. 3111 and the Legislature's budget is escalated, the Legislature is authorized to make expenditures from available funds.

"With regard to its procedural treatment by the Legislature, House Bill No.1054 was not afforded the precedence and deadlines applicable to appropriation bills. Instead, House Bill No. 1054 was subject to the deadlines applicable to general bills. The 'transfer bills' in previous legislative sessions, referred to above, were also treated procedurally by the Legislature as general bills.

"All of the comparisons of the constitutional requirements for appropriation bills with the contents of House Bill No. 1054 and the legislative procedure employed for enactment indicate that House Bill No. 1054 is a general bill, not an appropriation bill. The Governor, in his veto message, acknowledged that House Bill No. 1054 is a general bill. However, he characterizes House Bill No. 1054 as a general bill which contains an appropriation in Section 2 and, therefore, is subject to a partial veto.

"We are unable to find any authority for the proposition that any bill which authorizes the expenditure of public funds is an appropriation bill for purposes of Section 73. On the contrary, it is clear under *Fordice v. Bryan, supra*, that a bill must meet the constitutional requirements set forth for appropriation bills in order to be subject to partial veto under Section 73. While the Governor was authorized to exercise his general veto authority under Section 72 with regard to House Bill No.1054, he was not authorized to exercise his partial veto authority under Section 73. An unconstitutional attempt of a partial veto is a nullity. *See Fordice v. Bryan, supra, and State v. Holder*, 76 Miss. 158, 23 So. 643 (1898).

"Conclusion

"It is the opinion of this office that House Bill No.1054 of the 2011 Regular Session is not an appropriation bill and, therefore, is not subject to partial veto under Section 73."

Amendment Notes — The 2009 amendment added "except that members may receive...or in recess during a special session" at the end of (2).

CHAPTER 3

Construction of Statutes

SEC.

[3] See Sections 17-17-63(3), 21-35-31 (2), 27-19-44.2(2), 27-19-179(2), 27-103-303(4), 31-913,33- 15-311(2),37-151-25,45-39-5(4), 57-1-303(1)(a), 57-75-15(4)(b)-(m), 57-75-15(18)(b), and 69-46-7(1) and (2) of the Mississippi Code.

§ 1-3-4. Capital case, capital offense, capital crime, and capital murder.

JUDICIAL DECISIONS

1. In general.
4. Sufficiency of indictment.

1. In general.

Pursuant to Miss. Code Ann. § 13-5-73, jurors in a capital case should be sworn to well and truly try the issue between the state and the prisoner, and a true verdict should be given according to the evidence and law, and because the crime of forcible rape was a capital crime under Miss. Code Ann. § 97-3-65(4)(a), defendant was entitled to have the capital oath administered to the jurors, but the trial judge failed to administer that oath; however, the capital oath given in the middle of the trial, together with the petit oath given at the beginning of defendant's trial, which were substantially the same, were sufficient to instruct the jury of their duty. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

Defendant contended that the indictment failed to charge all of the elements necessary to impose the death penalty under Mississippi law, but his argument failed because (1) pursuant to Miss. Code Ann. § 99-19-101(7), a jury only needed to find that defendant killed, and did not need a true mens rea; (2) under Miss. Code Ann. § 99-19-101(5), aggravating circumstances existed; and (3) there was no increase in the maximum penalty because the maximum penalty for killing while engaged in the commission of sexual battery was death as the crime was defined as capital murder under Miss. Code Ann. § 97-3-19(2)(e), and, pursuant to Miss. Code Ann. § 1-3-4, a capital murder was a crime punishable by death. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

While the Parole Board was required to give public notice of an inmate's parole hearing under Miss. Code Ann. § 47-7-17 as the inmate's life sentence for armed robbery meant that he had been convicted of a capital offense, the inmate was not deprived of his due process rights because of the lack of hearing as the argument had not been raised in the lower court, and the inmate was not prejudiced by the lack of publication. Way v. Miller, 919 So. 2d 1036 (Miss. Ct. App. 2005).

4. Sufficiency of indictment.

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because his indictment was not deficient since, although capital rape was not an element of the crime of which he was charged, that fact was of no consequence since the labeling of each count as "capital rape" was mere surplusage. Additionally, it could hardly have been stated that capital rape was a false statement since defendant's maximum possible punishment for a violation of Miss. Code Ann. § 97-3-65(1)(b) was imprisonment for life. Gordon v. State, 977 So. 2d 420 (Miss. Ct. App. 2008).

§ 1-3-24. Intellectual disability.

The term "intellectual disability," when used in any statute, means a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, originates before the age of eighteen (18) years, and refers to persons who were, are and continue to be diagnosed with mental retardation.

SOURCES: Laws, 2010, ch. 476, § 1, eff from and after passage (approved Apr. 1, 2010.)

§ 1-3-33. Number, singular and plural.

JUDICIAL DECISIONS

0.5 Interpretation.

Miss. Code Ann. § 11-1-60(2)(a) instituted a cap on noneconomic damages recoverable by "the plaintiff," and under Miss. Code Ann. § 1-3-33, words written in the singular were to be read in the plural; therefore, a cap on noneconomic damages applied to all plaintiffs who brought a wrongful-death action pursuant to Miss. Code Ann. § 11-7-13. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555 (Miss. 2007).

A thorough review of Miss. Code Ann. § 1-3-33 and the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., revealed that there was no contrary intent manifested by the Legislature that meant that the MTCA should be interpreted only in the singular manner; Miss. Code Ann. § 11-46-15(1) was interpreted by using singular or plural language. Miss. DOT v. Allred, 928 So. 2d 152 (Miss. 2006).

§ 1-3-39. Person.

ATTORNEY GENERAL OPINIONS

A parochial school and/or church would come within the definition of a "qualified volunteer" and as such would enjoy the exemptions from liability provided by Miss. Code Ann. § 95-9-1 when providing the use of its buildings or other real property to the Red Cross, Catholic Charities, or other qualified volunteer organizations during an emergency. Compretta, March 16, 2007, A.G. Op. #07-00146, 2007 Miss. AG LEXIS 106.

§ 1-3-41. Personal property.

JUDICIAL DECISIONS

1. In general.

Corporation's contract fees for minor repairs performed on water and sewer systems were exempt from taxation because the systems were considered personal property. Blount v. ECO Res., Inc., 986 So. 2d 1052 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 343 (Miss. 2008).

Refund of sales tax was partially ordered because the exemption under Miss. Code Ann. § 27-65-21(1)(a)(i) applied to the repairs of water and sewer systems; moreover, there was substantial evidence to support the finding that repairs to underground pipes were real property, while other repairs to movable items were to personal property. Blount v. ECO Res., Inc., — So. 2d —, 2007 Miss. App. LEXIS 780 (Miss. Ct. App. Nov. 20, 2007), opinion withdrawn by, substituted opinion at 986 So. 2d 1052, 2008 Miss. App. LEXIS 276 (Miss. Ct. App. 2008).

§ 1-3-57. Unsound mind.

The term "unsound mind," when used in any statute in reference to persons, shall include persons with an intellectual disability, persons with mental illness, and persons non compos mentis.

SOURCES: Codes, 1892, § 1518; 1906, § 1599; Hemingway's 1917, § 1366; 1930, § 1390; 1942, § 698; Laws, 2008, ch. 442, § 1; Laws, 2010, ch. 476, § 2, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment substituted "persons with mental retardation, persons with mental illness" for "idiots, lunatics."

The 2010 amendment substituted "persons with an intellectual disability" for "persons with mental retardation."

RESEARCH REFERENCES

ALR. When Is Person, Other than One Claiming Posttraumatic Stress Syndrome or Memory Repression, Within Coverage of Statutory Provision Tolling Running of Limitations Period on Basis of Mental Disability. 23 A.L.R.6th 697.

§ 1-3-58. Ward.

Whenever the term "ward" is used, it shall be liberally construed and held to include any and all persons under every form of legal disability, including, but not limited to, the disabilities of minority, intellectual disability, mental illness, unsound mind, alcoholism, addiction to drugs, and convicted felons.

SOURCES: Codes, 1942, § 398.5; Laws, 1972, ch. 408, § 2; Laws, 2008, ch. 442, § 2; Laws, 2010, ch. 476, § 3, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment substituted "mental retardation, mental illness" for "idiocy, lunacy" and made minor stylistic changes.

The 2010 amendment substituted "intellectual disability" for "mental retardation."

§ 1-3-61. Written.

The term "written," when used in any statute, may include, but is not limited to, printing, engraving, and lithographing. In all cases where the signature of any person is required by law, it shall always be the proper handwriting of such person, or, in case he be unable to write, his proper mark, unless a different form of legal signature is specified in another statute.

SOURCES: Codes, 1892, § 1520; 1906, § 1601; Hemingway's 1917, § 1368; 1930, § 1392; 1942, § 700; Laws, 2012, ch. 374, § 1, eff from and after passage (approved Apr. 17, 2012.)

Amendment Notes — The 2012 amendment inserted "but is not limited to" preceding "printing, engraving, and lithographing", deleted "except that" thereafter in the first sentence, and added "unless a different form of legal signature is specified in another statute" to the end of the section.

§ 1-3-65. Construction of terms generally.

JUDICIAL DECISIONS

1. In general.

Under the statutory construction principles in Miss. Code Ann. § 1-3-65, the term "insured" in Miss. Code Ann. § 83-5-28 refers to a person involved in a contract with an insurer; the term does not have a technical meaning that would block the common interpretation that authorizing a person to act in a certain way also authorizes a person's agents to do so. Great Am. Ins. Co. v. Lowry Dev. LLC, 576 F.3d 251 (5th Cir. 2009).

ATTORNEY GENERAL OPINIONS

The term "foundation," as used in Miss. Code Ann. § 69-44-5, is not synonymous with, but may utilize services of, a bank or a banking institution's trust department. A foundation, as contemplated in the statute, would include a corporation or other similar entity organized and operated for the purposes set forth in that chapter, that is, to conduct a program of research, education and advertising designed to promote the corn industry in Mississippi. Spell, February 2, 2007, A.G. Op. #07-00019, 2007 Miss. AG LEXIS 11.

§ 1-3-67. How time computed when a number of days is prescribed.

JUDICIAL DECISIONS

2. Saturdays, Sundays and Holidays.

Where a political party's executive committee set a hearing for September 22, and served the contestant with notice of the hearing on Monday, September 15, since the time for service under Miss. Code Ann. § 23-15-921 — five days — was less than seven days, pursuant to Miss. Code Ann. § 1-3-67, the intermediate Saturdays and Sundays were excluded, and the candidate was timely served. Harpole v. Kemper County Democratic Exec. Comm., 908 So. 2d 129 (Miss. 2005).

§ 1-3-77. General severability provision.

JUDICIAL DECISIONS

1. Applicability.

Because H.B. 1671, Reg. Sess. (Miss. 2006), indicated no contrary intent, Miss. Code Ann. § 1-3-77 was applicable, and the supreme court severed only the last sentences of H.B. 1671 §§ 3 and 4; the city was not disqualified from continuing to pursue this project or any other private legislation that might be necessary. Oxford Asset Partners, LLC v. City of Oxford, 970 So. 2d 116 (Miss. 2007).

§ 1-3-81. Captions of title, chapter, article, subarticle, part or section of Mississippi Code of 1972.

(1) "Caption" means the words used to describe the substance of a title, chapter, article, subarticle, part or section of the Mississippi Code of 1972.

(2) Captions shall not constitute a part of the Mississippi Code of 1972 unless specifically so provided by law.

(3) The wording of captions that are not specifically provided to constitute law shall be editorial in nature and may be revised by a publisher of the code as the publisher deems appropriate. There shall be no exclusive right in any publisher of the code to the use of a caption that has appeared in any bill that is approved by the Governor, has become law without the Governor's signature, or is approved by the Legislature subsequent to a veto; captions that have appeared in such a bill shall be subject to editorial revision without legislative action.

SOURCES: Laws, 2010, ch. 506, § 43, eff from and after July 1, 2010.

CHAPTER 5

Session Laws and Journals

§ 1-5-7. Distribution of general laws and journals, and local and private laws free of charge.

The Office of the Secretary of State shall distribute and transmit, free of cost, the general laws and journals of each session of the Legislature, as follows: One (1) volume of each to the following: Governor, Lieutenant Governor, Secretary of State, Attorney General, State Auditor, State Treasurer, Clerk of the Supreme Court, the Court of Appeals; Mississippi State University, Mississippi University for Women, Alcorn State University, University of Southern Mississippi, Delta State University, Jackson State University, Mississippi Valley State University, University of Mississippi and University of Mississippi School of Law; the sheriff of each county for the county law library; each member of the Legislature; the Secretary of the Senate; the Clerk of the House; each attorney employed in the Legislative Services Offices of the House of Representatives and the Senate; each legislative committee meeting room in the New Capitol; the Legislative Reference Bureau; the Legislative Budget Office; the Department of Archives and History; and the Library of Congress at Washington, D.C. The copies to be provided each sheriff, member of the Legislature and each attorney employed in the Legislative Services Offices of the House and Senate shall not be provided unless specifically requested by such sheriff, legislator or attorney in writing. The Office of the Secretary of State shall provide, free of cost, one (1) volume of the local and private laws to each attorney employed in the Legislative Services Offices of the House of Representatives and the Senate; each legislative committee meeting room in the New Capitol; and the Legislative Reference Bureau; however, the copies to be provided each attorney employed in the Legislative Services Offices of the

House and Senate shall not be provided unless specifically requested by such attorney in writing.

In addition to the volumes provided to the Legislative Services Offices' attorneys under this section, four (4) volumes of the general laws, three (3) volumes of the local and private laws and two (2) volumes of the journal of the particular house involved shall be provided free of cost to the Legislative Services Offices of the House of Representatives and the Senate. Receipt of any number of volumes that are to be provided to the Legislative Services Offices and their attorneys under this section may be waived in writing by the Director of the Legislative Services Office of either house.

SOURCES: Codes, Hutchinson's 1848, ch. 19, art. 5 (6); 1857, ch. 6, art. 18; 1871, § 123; 1880, § 209; 1892, § 4090; 1906, § 4642; Hemingway's 1917, § 7480; 1930, § 6940; 1942, § 4200; Laws, 1938, ch. 215; Laws, 1940, ch. 317; Laws, 1978, ch. 458, § 5; Laws, 1988, ch. 486, § 2; Laws, 1992, ch. 543, § 4; Laws, 1993, ch. 430, § 4; Laws, 1993, ch. 518, § 9; Laws, 2004, ch. 473, § 1; Laws, 2010, ch. 376, § 2; Laws, 2012, ch. 390, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2010 amendment, in the first paragraph, rewrote the second sentence, and added "however, the copies to be provided each attorney...requested by such attorney in writing" at the end.

The 2012 amendment inserted "sheriff" twice preceding "member of the Legislature" and "legislator or attorney" in the second sentence of the first paragraph.

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